JD−27−05
Miami, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAN AMERICAN HOSPITAL CORPORATION,
Debtor in Possession

and

Cases 12-CA-23630
12-CA-23631
12-CA-23657
12-CA-23659
12-CA-23660
12-CA-23672
12-CA-23730
12-CA-23856
12-CA-23863
12-CA-23940

SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, CLC

and

Case 12-CA-23944

PEDRO ARMENTEROS, an Individual

Jennifer Burgess-Solomon and Jill Guarascio, Esqs.
for the General Counsel.
Arturo Ross and Warren Zaffuto, Esqs.
(Fisher & Phillips, LLP),
of Fort Lauderdale, Florida,
for the Respondent.
Kathleen Phillips and Libby Nowarrete, Esqs.
(Phillips, Richard & Rind, P.A.),
of Miami, Florida,
for the Charging Party Union.

DECISION AND ORDER

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of various charges filed by Service Employees International Union, AFL−CIO, CLC (the Union) or by Pedro Armenteros against Pan American Hospital Corporation, Debtor in Possession (the Respondent or the hospital).

Pursuant to notice, I conducted a trial in Miami, Florida, on July 26−30 and September 13-23, 2004,[1] at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

During the hearing, I granted the General Counsel's motions to amend the complaint, over the Respondent's objections. I concluded that their allowance resulted in no prejudice to the Respondent because their subject matters were closely connected to existing allegations, and the Respondent had the full opportunity to defend. See *D&F Industries*, 339 NLRB 618, 620−621 fn. 13 (2003); *Pergament United States,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). These amendments were incorporated in the second amended consolidated complaint, General Counsel's Exhibit 219, filed on September 23 (the complaint).

The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered. The Respondent also filed, on February 9, 2005, a notice of errata and motion to correct hearing transcript. The latter seeks to have excised or stricken a particular word in the transcript attributed to Attorney Arturo Ross, as having been a side comment to co-counsel that was mistakenly recorded. On February 15, 2005, the General Counsel filed a motion in opposition to the request to strike and, thereafter, a motion in opposition to the request to correct transcript, along with its own motion to correct transcript. To the extent that the parties agree on corrections, their motions to correct are granted. Where they disagree, there is no way to ascertain who is accurate.

The same holds true for their disagreement on the context in which Ross uttered the word in question. It is impossible to go back in time and reconstruct the circumstances in which it was said. In any event, whether the word was meant to be off or on the record will not affect my determinations on any of the issues before me, and I need not rule on the motion to strike.

Both the General Counsel and the Respondent made numerous motions/requests during the course of the hearing. I directed the parties to renew in their posthearing briefs any such motions/requests they wished me to consider in my decision. Accordingly, only those raised in the briefs will be addressed.

In its brief, the General Counsel renews its motions that sanctions be imposed against the Respondent under *Bannon Mills, Inc.,* 146 NLRB 611 (1964), and that Attorney Ross be sanctioned for misconduct. I had deferred ruling on these motions, both in the hope that the parties might resolve issues by the conclusion of the trial and, if not, to have the benefit of reviewing the entire record.

Regarding *Bannon Mills'* sanctions, the General Counsel urges that certain testimony and certain documents be excluded. Although discussion of this necessarily entails a preview of operative events, my determinations on the inclusion or exclusion of such will impact on what constitutes the record evidence on which facts can be found. For this reason, I will address *Bannon Mills'* sanctions after recitation of the issues.

As to sanctions against Ross, the appropriate vehicle for a judge who believes an attorney or other representative has committed trial misconduct is to file separately a recommendation for disciplinary action under Section 102.177 of the Board's Rules and Regulations. See *McAllister Towing & Transportation Co.*, 341 NLRB No. 48, slip op. at 5 fn. 7 (2004). Therefore, this matter will be the subject of a supplemental decision.

[1] All dates occurred in 2004, unless otherwise specified.

Issues

On the first day of hearing, the Respondent amended its answer to no longer deny the factual allegations, or the resulting legal conclusions, relative to Juan Campos, environmental department director. Thus, it is not disputed, and I find that the Respondent, through Campos:

1. Violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (a) on about December 23 and 24, 2003, telling employees not to discuss employment matters concerning their mutual aid and protection with coworkers; (b) in about December 2003, and between January 15 and 26, threatening to replace employees with outside contractors if they supported the Union or engaged in concerted protected activities; (c) in about early January, interrogating employees about their union activities and telling them it would be futile for them to select the Union as their collective-bargaining representative; (d) in about mid-January, impliedly threatening employees with unspecified reprisals by telling them they were disloyal because they supported the Union and engaged in concerted protected activities; (e) on about January 15, instructing employees to remove union insignia; and (f) between about January 15 and 26, threatening to rescind an "open door" policy if employees selected the Union as their collective-bargaining representative.

2. Violated Section 8(a)(3) and (1) of the Act by issuing written warnings on about December 23, 2003, to Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia, because they engaged in concerted protected activities by requesting and obtaining permission to leave a training meeting conducted solely in English.

The issues are:

1. Whether these individuals were agents of the Respondent: Dr. Modesto Mora, Dr. Lourdes Sanjenis, Janet Cabrera, and Vicente Rodriguez.

Dr. Mora is a member of the hospital's board of directors (the board) and one of the hospital's founders. Despite my order directing him to appear pursuant to the General Counsel's subpoena, he did not, and no explanation was offered for his failure to comply.

Dr. Sanjenis is chairperson of the board and Dr. Mora's wife. She did not testify.

Cabrera is the office manager of the South Florida Medical Group (the medical group), where Dr. Mora has maintained his private medical practice. The issue of her agency status is most important in relation to a conversation Charging Party Armenteros testified they had on about December 30, 2003, in which she told him that Dr. Mora had stated he would fire Armenteros and his wife and daughter (also hospital employees) if they signed union cards. Cabrera was not called as a witness.[2]

Rodriguez was the hospital's public relations director until March. His agency status also is most significant in terms of a conversation he had with Armenteros, on about January 14, in which he attributed statements to Dr. Mora similar to those of Cabrera. He did testify.

[2] The Cabrera who testified was Tania Cabrera, a coworker of alleged discriminatee Francisco Anido.

2. Whether the Respondent discharged the following named employees because they engaged in union activities: Francisco Anido and Juan Carlos Cardenas on January 13, Reymundo Camejos on January 14, Pedro Armenteros on February 23, and Hector Gonzalez on May 14. Further, whether the Respondent has refused to rehire Felipe Hernandez since May for the same reason.

3. Whether the Respondent interfered with employees' protected rights by making threats or other coercive statements, alleged as follows.

Office Manager Cabrera, in her conversation with Armenteros on about December 30, described above, created the impression of surveillance of employees' union activities and threatened employees with discharge in retaliation for their engaging in such activities. This conversation is further alleged as the basis of the allegation that Dr. Mora, on about the same date, impliedly threatened employees with discharge in retaliation for their union activities.

Director Rodriguez, in his conversation with Armenteros on about January 14, described above, threatened employees with discharge in retaliation for their union activities.

Edgar Diaz, cardiopulmonary department director, in about late December 2003, in a conversation with Camejos, impliedly threatened employees with unspecified reprisals if they engaged in union activities.

Delsie Bosch, human resources (HR) director, on January 13, at Cardenas' termination interview, informed employees they were being discharged due to their union activities; and on January 14, at Camejos' termination interview, informed employees that they were prohibited from engaging in union activities at work.

Security department personnel prohibited employees from distributing union literature during nonwork time in nonpatient care, nonwork areas, to wit, the main parking lot, on various occasions starting on December 18, 2003, and ending on June 4.[3]

Finally, Attorney Ross' letters dated June 11 to Armenteros and Cardenas are alleged to have threatened employees with civil or criminal action in retaliation for their union activities.

Bannon Mills' Sanctions

Sanctions may be imposed for an unequivocal refusal to comply with an administrative law judge's order directing the production of documents pursuant to subpoena. *Smithfield Packing Co.,* 344 NLRB No. 1, slip op. at 10 (2004)*; US Postal Service*, 339 NLRB 400 (2003). They may also result from a respondent's lack of proper diligence in complying with a subpoena. See *McAllister Towing*, supra. Simply stated, a party should not be rewarded for noncompliance by gaining an advantage in the presentation of evidence, either substantively or procedurally.

Sanctions where the subpoenaed document has not been produced may include permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and

[3] The complaint states "nonpatient care areas," but the Board considers the presumptively proper scope of location for solicitation and distribution in health care facilities to be "nonpatient care, nonwork areas." See *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 350 (2002).

drawing adverse inferences against the noncomplying party. *McAllister Towing*, supra. The underlying rationale is that a respondent that has refused to provide subpoenaed materials that are the best evidence of a fact should not be allowed to introduce secondary, less reliable, evidence of matters provable by those materials. See *Smithfield Packing,* supra; *Avondale Industries*, 329 NLRB 1064, 1244−1245 (1999); *Hedison Mfg. Co.*, 249 NLRB 791, 796 (1980) *Bannon Mills*, supra.

As the General Counsel's brief reflects, numerous accusations were levied back and forth at various points during the trial on subpoena duces tecum issues, first on their proper scope and then on the Respondent's compliance with my rulings.

Three observations are in order. First, many types of documents were subpoenaed. Some were short and easily obtained; others involved greater effort in assembling and transporting, in particular over 800 employee personnel files.[4] Second, the General Counsel and the Respondent disagreed on when some of the documents were produced. Third, with one exception, Camejos' termination paper, all subpoenaed documents were eventually provided to the General Counsel. The termination paper will be treated in the section on Camejos' discharge.

The produced documents fall into two basic categories. The first encompasses those discussed between opposing counsels and ultimately provided to the General Counsel independent of any witness testimony. These include security logs and fax pages from Anido's personnel file.

The second consists of documents that the Respondent provided to the General Counsel only after the testimony of witnesses raised their existence on the record. Included are notes prepared by Maria Corzo, chief operating officer (COO) and chief compliance officer, relating to Anido's discharge; and a summary of events prepared by Alexandra Zuniga, director of the physical therapy (PT) department, relative to Cardenas' discharge. Also in this category are a police report and photographs involving flat tires to employee Rene Mirta's automobile in the hospital parking lot in August (in reference to Anido's discharge in January); and documents pertaining to a lawsuit filed by the hospital against the Pan American Cuban Medical Convention, Inc. (CMC), involving Director Rodriguez.

Turning to specific documents, security logs were among the documents I directed the Respondent on the first day of trial to provide to the General Counsel. Incomplete logs were initially produced, and I directed the Respondent on September 13 to provide the original logbooks to the General Counsel for review and copying. The Respondent complied. The General Counsel had the opportunity to review and to examine witnesses of the Respondent on them, and I allowed the General Counsel to amend the complaint to add additional violations of Section 8(a) (1) based on later-received log entries.

The General Counsel cites *McAllister Towing*, supra, for the proposition that *Bannon Mills'* sanctions should be imposed because the Respondent did not bring subpoenaed documents to the hearing on the first day, and this would include the security logs. In that case,

[4] These were delivered to the hearing by truck. The Respondent submitted a bill to the Region for their packing and transportation. The Region refused to pay, and the Respondent then filed an interlocutory motion for costs, which the General Counsel opposed. In its brief, the Respondent has not renewed this motion or otherwise indicated that it still seeks any such reimbursement.

Judge Margaret M. Kern had earlier instructed the respondent's counsel to "substantially comply" with the General Counsel's subpoenas, and when she issued her formal rulings directing compliance, he equivocated on whether the respondent would even make a good-faith effort to obtain documents. Such was not the situation here.

In the totality of circumstances, I find sanctions unwarranted with regard to the production of security logs. It does not appear that the Respondent deliberately withheld them or that the General Counsel was prejudiced in any way. Moreover, the General Counsel introduced and used certain log entries as the bases for additional violations in the complaint. For me to now exclude the testimony of security guards, as the General Counsel urges, would essentially deprive the Respondent of an opportunity to defend and thereby violate fundamental due process.

As to the fax pages in Anido's personnel file, the Respondent initially provided two incomplete faxes to the General Counsel. When this was brought to Ross' attention, the missing pages were located by his paralegal and provided. I do not find that the Respondent's actions in this rose to the level of a refusal to produce documents and therefore will not impose any kind of sanctions.

I now turn to the second category. On the first day of trial, I narrowed the scope of the General Counsel's subpoena on the subject of pending lawsuits and directed the Respondent to produce documents relating to any lawsuits filed against the Respondent and/or its current former board members, collectively or individually, for misappropriation of funds, including any allegation of misuse of personnel from January 1,1998, to the return date of the subpoena, that "name[d] or in any way involve[d]" Mora, Armenteros, and/or Rodriguez.[5]

No such documents were furnished to the General Counsel. On September 15, during the cross-examination of Rodriguez, Ross offered Respondent's Exhibit 31, a letter dated March 3 from the hospital's attorney to Rodriguez' attorney, accusing Rodriguez of, inter alia, misappropriating hospital funds, and threatening legal action. After Rodriguez' testimony, the General Counsel renewed its request for production of documents pertaining to lawsuits. The Respondent then produced a complaint filed on June 23 by the hospital against CMC, in which Exhibit "C" consists of the March 3 letter above, as well as a similar letter dated March 17; and CMC's answer, filed on September 7 (GC Exhs. 176(a) and (b), respectively).

The General Counsel argues for exclusion of the Respondent's evidence concerning the lawsuit—Respondent's Exhibit 31; Respondent's Exhibit 10, a photograph taken at the last convention; and testimony on the subject by Vicente Sanchez, the Respondent's executive director and executive officer.

My direction clearly encompassed all of the above documents, with the possible exception of Respondent's Exhibit 10. They were in existence several months before the trial opened, other than General Counsel's Exhibit 176(b), which the Respondent's counsel should have provided to the General Counsel as soon as he received it—certainly before Rodriguez began his testimony.

Accordingly, I find *Bannon Mills'* sanctions appropriate and exclude Respondent's Exhibits 10 and 31, which are now rejected. I also exclude the pertinent testimony of Sanchez as secondary evidence. Fairness dictates that other documents encompassed by my ruling be

[5] Tr. 114, 117.

treated similarly, even though the General Counsel has not so requested; I consider the fruit of the poisoned tree principle to apply, and exclusion of evidence improperly submitted should not be selectively applied in a manner to favor the General Counsel. Therefore, I also exclude General Counsel's Exhibits 176(a) and (b) and designate them as rejected.

I further directed the Respondent at the outset of the trial to provide, inter alia, notes prepared by supervisors regarding the discharges of the alleged discriminatees.

However, only on the cross-examination of Director Zuniga on September 20 was it discovered that she had prepared notes concerning alleged complaints against Cardenas. The General Counsel then requested their production, and the Respondent produced Zuniga's summary of events that included such complaints (GC Exh.182, dated January 14). The General Counsel now requests that documents referenced in the summary, relating to a staff meeting she held with employees on December 4 and union flyers found in her department (R. Exhs. 43 and 44–46, respectively), as well as her testimony concerning employee complaints, flyers, and that meeting be excluded. The General Counsel does not ask for exclusion of the notes themselves.

Aside from anything contained in the summary, the Respondent provided independent documentary evidence in support of the staff meeting and the flyers (R. Exhs. 43 and 44–46, respectively, which were offered and received on September 17). Accordingly, I consider exclusion of those documents and Zuniga's testimony thereon to be an overly broad sanction for the Respondent's failure to produce the subpoenaed notes.

The next step is treating the summary itself and Zuniga's testimony concerning employee complaints. Although the document has no heading, all of the listed items relate, directly or indirectly, to the Respondent's defenses for Cardenas' discharge and thus fall under the scope of my direction. Accordingly, I now sua sponte reject the document and make General Counsel's Exhibit 182 a rejected exhibit. However, the summary was in the nature of corroboration of Zuniga's testimony, not a matter of primary evidence. Thus, she testified about employee complaints, not what was stated in the summary about employee complaints. Accordingly, I will not exclude Zuniga's testimony.

Similar to the above, on September 21, the first knowledge the General Counsel had that COO Corzo took notes of Rene's complaint about Anido was when it cross-examined Rene. The General Counsel then requested their production, but Ross represented that he did not have them. The following day, Corzo stated on cross-examination that she had provided them to Ross, who said he did not have them and asked her to produce them. She did so. The General Counsel offered them as General Counsel's Exhibit 213.

The General Counsel contends that documentary evidence related to Corzo's notes, including Anido's termination report (R. Exh. 6), and Corzo's testimony concerning her conversation with Rene about Anido should not be considered.

I find, rather, that the appropriate sanction is the exclusion of Corzo's notes, General Counsel's Exhibit 213, because they were not properly produced pursuant to subpoena. It is now a rejected exhibit. As with Zuniga, I do not consider any of Corzo's testimony—other than with regard to the notes themselves—to be "secondary evidence" in lieu of primary evidence. In any event, the notes consisted of only two short handwritten incomplete sentences, with no heading or date, and the General Counsel had the opportunity to cross-examine Corzo about

them. Any adverse impact on the General Counsel's ability to present its case was negligible.[6] Therefore, I deny the General Counsel's request to strike any of Corzo's testimony, other than her testimony about taking the notes.

Finally, the General Counsel asserts that the Respondent failed to comply with my direction at the outset of the trial to produce police reports and photographs relating to the discharged employees. In connection with the Respondent's defense for discharging Anido, Ross offered such types of documents (R. Exhs. 66 and 67) during his direction examination of Rene on September 21, concerning flat tires she had in the hospital parking lot in August. Ross represented that he had received these documents the previous Saturday. It is undisputed that he did not provide them earlier to the General Counsel.

Since Anido's discharge took place in January, the August incident logically could have played no part in the decision to discharge him, and the documents in question were technically outside the scope of the subpoena. However, Ross has contended that the incident bears on whether the discharge was justified. Therefore, in compliance with my ruling, he should have provided the documents to the General Counsel as soon as practicable after he received them and, certainly, before Rene began testifying.

As opposed to Zuniga's and Corzo's notes that were confirmations of other events, the police report and photographs were integral and necessary parts of the incident itself. Accordingly, I find it appropriate to exclude Respondent's Exhibits 66 and 67, which are now rejected, and to exclude any secondary evidence of the incident, to wit, Rene's testimony.

Facts

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

THE HOSPITAL

The Respondent operates an acute care hospital in Miami, Florida, providing inpatient and outpatient care, primarily to elderly Hispanic Americans. The hospital has over 30 departments. Department directors report to either COO Maria Corzo, who is in charge of all areas of clinical services (with over 150-200 employees), or to Sandy Sosa-Guerrero, chief nursing officer (CNO), who oversees all nursing and related units (employing 400-500 employees). They, in turn, report to Executive Director Vicente Sanchez, the hospital's highest administrative official.

Sanchez played a key role in the termination of Armenteros, whereas Corzo did the same in the discharges of Anido, Camejos, and Cardenas. Delsie Bosch, HR director since November 1993, was present at all of the termination interviews but played no part in any of the decisions to discharge. Nor was she involved in the decision not to rehire Hernandez.

[6] See *People's Transportation Service*, 276 NLRB 169, 222 (1985) cited in Member Schaumber's dissent in part in *McAllister Towing*, supra at slip. op. at 13.

THE UNION'S ORGANIZING DRIVE AND REPRESENTATION CASE PROCEEDINGS[7]

Between November 20, 2003, and January 27, the Union filed petitions for certification as representative of six distinct bargaining units at the hospital: registered nurses, nonprofessional employees (excepting skilled maintenance), technical employees, skilled maintenance employees, and business office clericals.

Pursuant to stipulated election agreements, elections were held on January 15. The Union received a majority of votes in each of the bargaining units. The Respondent filed objections to the conduct of all six elections, which objections were heard by a hearing officer, who recommended that the objections be overruled. The Respondent appealed this determination to the Board.

On August 31, the Board upheld the hearing officer's recommendations and conclusions as to five of the elections and certified the Union as the representative of the hospital's registered nurses, nonprofessional employees, technical employees, and business office clericals. Regarding the skilled maintenance employees' election, the Board sustained the Respondent's objections and directed a second election. In the rerun election, the Union failed to obtain a majority of votes cast and filed objections that remain pending before Region 12.

I draw no inferences of any kind from the filing of post–hearing objections by either the Respondent or the Union, pursuant to their statutory rights to question whether the other's conduct destroyed the laboratory conditions necessary for fair elections.

INDIVIDUALS WHOSE AGENCY STATUS IS CONTESTED

A. Drs. Modesto Mora and Lourdes Sanjenis

The Board presumes officials of an organization are its agents clothed with apparent authority. *House Calls* 304 NLRB 311 (1991) *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989). Absent compelling contrary evidence, the holding of such office is persuasive and substantial evidence that will lead to a finding of agency status. *Electrical Workers Local 453 (National Electrical Contractors Assn.)*, 258 NLRB 1427, 1428 (1981).

Neither Drs. Mora or Sanjenis, or any other members of the hospital's board of directors, testified. I credit Executive Director Sanchez' uncontroverted testimony regarding his position, his interview for the position, and the board's role, and find the following facts.

Drs. Mora and Sanjenis were the two board members who interviewed him (and, evidently, recommended his hire to the full board). They told him during the interview that he would be responsible for the hospital's day-to-day operations and the management of its employees. He serves at the pleasure of the board, which sets the policies of the hospital and approves major transactions.

Sanchez' testimony clearly establishes that Drs. Mora and Sanjenis exercise authority over him, the hospital's highest administrative official, and are at the top of the Respondent's chain of command. They therefore possess not only putative but actual authority.

[7] See GC Exhs. 11(a)-(f), 12(a)-(f), & 13(a)-(f).

I note also that Dr. Sanjenis held herself out to employees as a representative or agent of the Respondent in a letter with hospital letterhead that in late June was hand-distributed to employees and posted at the timeclocks, in which she responded to statements made in the Miami Herald concerning the Respondent and the Union.[8] She signed this letter as chairperson of the hospital's board.

Based on the above, I conclude that Drs. Mora and Sanjenis are and were agents of the Respondent within the meaning of Section 2(11) and (13) of the Act and under common law principles of agency.

Finding them to be agents of the Respondent, I draw an adverse inference against the Respondent on any factual matters in the case about which they likely would have knowledge. See *Daikichi Sushi*, 335 NLRB 622 (2001) *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F. 2d 730 (6th Cir. 1988); *Martin Luther King Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977). I also deem this an appropriate sanction for Dr. Mora's failure to comply with subpoena. See *McAllister Towing*, supra; *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994).

B. Director Vicente Rodriguez

Rodriguez was public relations director from 1970 until March, when he was terminated. In a July 2000 classification of managers, the Respondent classified him as a manager level 300 (director's level), rather than the lower level of 200, in which it placed admitted supervisors Armando Delgado, Pedro Ortiz, and Alfredo Padilla.[9] There is no evidence that his classification was ever later changed.

Rodriguez reported directly to Dr. Mora and never punched a timeclock. He was in charge of media relations and publications and also accompanied Mora to various events. One of his responsibilities was putting on meetings of the CMC. Rodriguez used to have an office at the hospital but was moved to a warehouse facility about a year before his employment ended. Although Rodriguez at different times had a secretary to whom he assigned work and gave evaluations, his testimony was too unclear as far as dates to make a finding that in recent years he exercised supervisory authority within the meaning of Section 2(11) of the Act.

Clearly, though, he occupied the status of a managerial employee and was considered one by the Respondent. As such, he was an agent under Section 2(13) of the Act, and his statements to Armenteros were imputable to the Respondent. *Modern Mfg. Co.,* 261 NLRB 534 (1982); *Idaho Falls Consolidated Hospitals*, 257 NLRB 1045 (1981).

C. Office Manager Janet Cabrera

As a hospital courier, Armenteros frequently made deliveries to the medical group offices, where Cabrera was the office manager and Dr. Mora maintained his individual medical practice. Cabrera interfaced with Armenteros' employment through the years. For example, she signed his March 1986 evaluation as his evaluator and supervisor, signed as evaluator for his pay increase in November 1987, and notarized his hospital retirement plan document after

[8] GC Exh. 31(a) & (b).

[9] GC Exh. 93.

his termination.[10]

Armenteros testified that when Cabrera called him on about December 30, 2003, she not only made statements she attributed to Dr. Mora that Armenteros and his family members would be fired if they signed union cards, but she further said that Mora was directing him to go to the hospital the following morning to meet with the hospital's attorneys regarding the Union. Significantly, the Respondent has confirmed that Mora did instruct Cabrera to tell Armenteros to so report for that purpose.[11]

The Board applies common law principles of agency in determining whether an employee is an employer's agent, and hence if his or her conduct is attributable to the employer. Ergo, if another employee has a reasonable basis to believe that the employer has authorized the conduct, the employer is responsible. *D&F Industries*, supra, slip op. at 2; *Cooper Industries*, 328 NLRB 145 (1999) *GM Electrics*, 323 NLRB 125 (1997) (secretary found to be agent). This may occur when the alleged agent has been held out as a conduit for transmitting information from the employer. *Cooper Industries; Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

The fact that Cabrera was an employee of the medical group and not per se of the hospital does not prevent her from being found to be an agent of the hospital. See *D & K Frozen Foods*, 293 NLRB 859 (1989) *Lemay Caring Center*, 280 NLRB 60, 66 (1986) affd. sub nom. 815 F.2d 711 (8th Cir. 1987). In this regard, the hospital and the medical group were not wholly separate entities, in light of their connection in the person of Dr. Mora. Further, in the course of his duties as a courier for the hospital, Armenteros made frequent deliveries to the medical group over a period of many years. I find that a reasonable person in Armenteros' position would have concluded that Cabrera spoke for Mora. Indeed, Cabrera had the actual authority to call Armenteros and relate Mora's instruction to him.

Accordingly, I find that Cabrera was an agent of the Respondent within the meaning of Section 2(13) of the Act. Therefore, the burden was on the Respondent to call her as a witness, and not on the General Counsel, as argued in the Respondent's brief.[12] As with Drs. Mora and Sanjenis, I draw an inference against the Respondent on any factual matters about which she likely would have knowledge.

ALLEGED DISCRIMINATORY CONDUCT

Independent 8(a)(1) allegations pertaining to particular alleged discriminatees will be included herein.

A. Francisco Anido's discharge on January 13

Anido was employed as a medical lab technologist (lab tech) since1995, or for about 8–9 years. For the last several years, he worked the third shift, 11 p.m. to 7 a.m. under the supervision of Armando Delgado, lab administrative director. Delgado supervises about 52 employees.

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[10] GC Exhs. 25, 26 & 27.

[11] GC Exh. 178 at 5 (position statement).

[12] In this regard, the Respondent's admission of her agency status on behalf of Mora, at least in part, was made prior to the opening of the trial.

Anido's Statements to Cabrera and Rene

Anido signed an authorization card in late December and, at around the same time, had a conversation in the lab with lab tech Tania Cabrera. Lab techs Mariza Mora (no relation to Dr. Mora) and Mirta Rene were also in the area. Since this one conversation formed the sole basis for Anido's termination,[13] I need not address any of his prior work history.

Anido, Cabrera, and Rene all testified about what Anido said in this conversation. Cabrera and Rene are still employed by the Respondent.

Cabrera struck me as the most forthright of the three. Although her recall of the conversation was not precise, she credibly testified that she did not give it any importance, and she answered questions directly and without any apparent hesitation. Although in other portions of his testimony, Anido had trouble staying focused in his answers, added qualifiers (i.e., "kind of" or "may have"), and equivocated, he was specific and unequivocal in relating this conversation, and his version was substantially consistent with Cabrera's.

For the variety of reasons that follow, Rene was not credible. I need not base my negative credibility assessment on any inferences arising from Armenteros' unrebutted testimony that Dr. Mora told him that Rene was a long-time friend of the Mora family, going back many years to when they were still in Cuba.

When she was testifying, Rene often seemed deliberately overdramatic, sometimes even melodramatic, leading me to believe that she was exaggerating. Related to this, Rene's testimony about how frightened she was did not mesh with her actions. She testified that Anido threatened to burn down her house and damage her car and that she was afraid to go out, yet she did not report the incident to COO Corzo for several days, never called the police, and never filed a hospital security report.

Rene was impeached on two points concerning her reporting of the incident to Corzo. As to why she went directly to Corzo instead of to Delgado, her supervisor, she first testified that it was because she thought this was "more serious." However, when the General Counsel asked if the reason was that Delgado had not done anything in the past when she complained to him about issues, Rene then said yes (Delgado, whom I find was credible, testified that she had not previously complained).

Rene herself conceded that she waited a long time to report the incident to Corzo, first stating that the reason for her delay was that she was "afraid." However, the reason she gave at the representation (R) hearing was that Anido did not state that he was the one who took action against her. On re-direct examination, Rene provided yet a third reason; that she appreciated Anido. Rene never explained why, after several days, she finally decided to see Corzo.

Therefore, I credit Anido's and Cabrera's versions of the conversation where they differed from hers, and find the following.

Anido had several previous conversations with Cabrera about the Union. This conversation was short (2–3 minutes) and casual, as reflected by Cabrera's testimony that she

[13] See R. Exh. 6, Anido's termination report.

attached no importance to it and concluded that his comments had nothing to do with her. Cabrera asked Anido what he thought about the Union. He replied that as far as he knew when a union came in and represented employees, it was supposed to negotiate with a company to reach a contract; if not, there could be a strike. He further said that violence could occur when people crossed the line, such as tires slashed.

When I asked Cabrera who Anido said had done that, she replied, "[P]eople that wanted the union and people who did not want the union. . . . Not that he was going to do that. He was just talking about anecdotes concerning things that had happened." [14]

Rene got upset over Anido's statements and said that this was a free country and they could choose to be part of the Union or not.

Cabrera did not report the incident to any managers or supervisors, and none of them ever talked to her about it, or to Anido prior to his termination interview on January 13.

Management's Response

After Rene reported the incident to Corzo several days later, Corzo met with Delgado. They gave conflicting accounts of their meeting and its aftermath.

According to Corzo, she called Delgado to her office and related Rene's accusations against Anido. She then asked him to investigate and, if he verified it was true, to terminate Anido. She further testified that she had a subsequent conversation with Delgado days later (she was vague about the specific details), in which he told her that he had met with Anido, who acknowledged part of the allegations. Therefore, Delgado had gone ahead and terminated him.

In marked contrast, Delgado testified unequivocally that Corzo did not ask him to investigate the incident and that he played no role in the decision to terminate Anido. Rather, Corzo called him in and presented Anido's termination as a fait accompli, based solely on the complaint or complaints she had received about his making threatening remarks. Delgado's testimony was supported by Anido, who testified that he had no contact whatsoever with management about the incident prior to his discharge. Delgado's account was also consistent with the language in the termination report Anido received stating, "Following orders from Administration (M. Corzo) Frank has been terminated." Thus, Corzo's testimony was controverted not only by Delgado but by the Respondent's own document.

I credit Delgado's account over Corzo's. Delgado struck me as candid, he answered questions directly and readily, and his testimony was internally consistent. Corzo, on the other hand, was not a reliable witness in general. With respect to Anido alone, ample reasons support this conclusion. First, she was directly contradicted by a supervisor I find more credible, as well as the Respondent's own document. I also find it incredible that she did not obtain any kind of written statement from Rene, prepare any kind of formal report, or make a referral of the matter to the security department. I would certainly expect a high-level manager such as Corzo to have better documented a serious allegation before discharging an employee because of it.

[14] Tr. 502–503. Rene conceded that, in response to her threat to call the police if Anido was threatening her, he explained that he was talking about events that would or could happen if there were a strike, not about anything he would do presently. She told this to Corzo when she related the incident.

Significantly, CNO Sosa-Guerrero testified that when there is a threat against an employee, an investigation is conducted and a security report is generated, yet Corzo did neither.

Other testimony of Sosa-Guerrero weakened Corzo's credibility. At the R case hearing on February 26, Sosa-Guerrero testified that in late December 2003 or early January, Corzo called her to her office. Corzo informed her that she was investigating Anido and wanted to know if Sosa-Guerrero had had any similar problems. She replied no. Corzo then said that maybe it was a solitary or one-time issue, and they agreed they were "not going to put a lot of weight on the matter."[15]

I credit that prior testimony over Sosa-Guerrero's testimony before me on the subject. She appeared evasive and frequently claimed lack of recall, and I cannot believe that her recollection of this conversation would have diminished so greatly in a matter of mere months. I would expect better memory from a high-level manager. She also had what appeared to be convenient lack of recall when asked if Dr. Mora attended any of the meetings with the hospital's attorneys regarding the Union. The presence of a figure as paramount in the hospital structure as Mora is not a matter where I find failure of recall plausible.

Termination Interview on January 13

Delgado, HR Director Bosch, and Anido were present. Delgado stated that Anido was being terminated because he had made threatening remarks to another employee. Since the decision to discharge him had already been made, I need not go into detail about what was said at this meeting about the allegations. Suffice to say, neither management nor Anido made statements against interest. Consistent with Delgado's testimony and the termination paper, Anido testified that Delgado and Bosch said "top administration" had made the decision to terminate him. I draw no inferences from the fact that Anido signed the termination paper but wrote in no comments.

B. Juan Carlos Cardenas' Discharge on January 13

The Hospital's Solicitation and Distribution Policy

The hospital relies in substantial part on the defense of violation of its no-solicitation/no-distribution rules in the discharges of two of the alleged discriminates—Cardenas and Camejos.

1. Legal parameters

As applicable to all employers, rules prohibiting solicitation on an employee's or other employees' worktime are presumptively valid, with employees being able to solicit on nonworktime in both work and nonwork areas. See *Eagle-Pitcher Industries* 331 NLRB 169, 174 (2000); *St. John's Hospital*, 222 NLRB 1150 (1976). An employer can lawfully place more restrictions on distribution, recognizing that distribution of literature or other physical objects can potentially result in more interference in, or disruption, to the employer's business than mere speech. Thus, an employer's prohibition against distribution during work time or in work areas is presumptively valid. See *MEMC Electric Materials, Inc.,* 342 NLRB No. 119 (2004); *TeleTech Holdings, Inc.* 333 NLRB 402, 403 (2001).

Special rules apply to solicitation and distribution in health care facilities, in recognition of

[15] Tr. 1421.

their unique role of providing medical treatment to patients. Both solicitation and distribution may be prohibited in immediate patient care areas; in other work areas, restrictions are presumptively invalid but can be overcome by a showing that they are necessary to avoid disruption of care or disturbing of patients. *NLRB v. Baptist Hospital*, supra; *Doctors' Hospital of Staten Island*, *Inc.* 325 NLRB 730 (1998); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159−160 (1992).

Facially valid rules that are discriminatorily applied to employees engaged in union or other protected concerted activities lose their validity. *A.P. Painting & Improvements,* 339 NLRB 1206, 1207 (2003); *Our Way, Inc.* 268 NLRB 394, 395 (1983).

2. The hospital's written policy[16]

These are contained in the hospital's policies and procedures manual, consisting of three volumes, each several inches or more thick, maintained in each department. Employee job descriptions reference the hospital's administrative manuals, and new employees, at orientation, are told to become familiar with them.

The General Counsel does not argue that anything in the written policy overly restricts employee solicitation or distribution. Rather, it contends that the policy was discriminatorily applied to Camejos and Cardenas. The Respondent, on the contrary, asserts that the policy has been strictly enforced, and thus employees engaged in union activities were not disparately treated.

3. Other solicitation and distribution

Bulletin Boards

HR maintains a bulletin board, locked and behind glass, near the timeclocks on the first floor of the hospital. HR permission is required to post anything thereon.

As an initial matter, I do not consider the following postings on this bulletin board to have constituted employee solicitation. The first was Dr. Sanjenis' advertisement (ad) for the sale of a car, which Cardenas saw in December 2003. As chairperson of the board, she logically was in a separate category from rank-and-file employees and not governed by the same rules and standards. The second were ads for Disney World trips, seen by Felix Monzon. They listed an HR contact person and apparently were events sponsored, subsidized, or at least encouraged, by the hospital.

There was testimony about employees' ads posted on the HR bulletin board: a canoe for sale (Cardenas); apartments for rent, and household items for sale (armoires, tables, chairs, refrigerators, and cars) (Charge Nurse Juanita Alicante); and furniture for sale (Felix Monzon).

On cross-examination, Alfredo Padilla, director of security, conceded that employees are able to post items of a personal nature on the HR bulletin board, although he has not seen this in a while.

[16] R. Exh. 24.

Turning to department bulletin boards, the testimony of various supervisors reflects that the hospital's official policy is not to permit employees to post items of a personal nature. However, several employees testified to seeing such on the bulletin boards, as follows.

Camejos testified that employees used the respiratory therapy department bulletin board (as opposed to the main bulletin board in the department used by management) to post for rent and for sale signs and other ads.

Cardenas testified that on the bulletin board in the PT department kitchen, where employees ate lunch and took breaks, employees posted whatever they wanted, with the exception of selling personal items. These included jokes, news, notices, ads for parties, and food collections, and Cardenas posted many such items himself, without seeking permission. He testified without controversion that in November 2003, Director Zuniga, his supervisor, observed him posting a flyer relating to the Free Trade Area of the Americas Summit taking place in Miami, they discussed demonstrations in connection with that event, and she never reprimanded him for posting the flyer.

Current employees Alicante, Monzon, and Charge Nurse Marietta Vasquez all have seen employee for-sale notices posted on the bulletin boards in nursing stations, for a variety of items, such as furniture, bicycles, or cars. Vasquez related that, in addition to those ads other typically posted items are schedules, memoranda, invitations for weddings, and picnics. She personally has posted union flyers, invitations, memos, and postcards from employees who traveled abroad. Neither Alicante, Monzon, nor Vasquez have ever heard any supervisors or managers say anything about what to post on these bulletin boards or of any employees disciplined for posting.

I credit the substantially similar testimony of these witnesses on what has been put on the bulletin boards in their departments. Significantly in this regard, Group Leader Joaquin Trista's testimony implicitly makes it clear that, despite what might be official hospital policy, employees do post ads for such things as the sale of houses or dogs, or apartment rentals, on the bulletin boards. Thus, when asked if he always removed such ads, he replied candidly, "I try to do my best. I wouldn't say that I do something always because it's impossible,"[17] suggesting that the practice is fairly widespread.

Based on the above, I find that HR has allowed employees to post items of a personal nature on its first floor bulletin board. I further find that, at least in many departments, employees have been permitted to freely post ads and other items of a personal nature on bulletin boards.

Sales of Products and Other Solicitations

Monzon was the single most important witness on the subject of employee sales because he personally engaged in such activity on a regular basis for many years. Monzon appeared candid, and his testimony about his own sales activities and those of other employees was consistent with other credited testimony. I find that his active support for the Union, as well as his testimony on cross-examination that he was friendly with Cardenas and upset when Cardenas was fired, insufficient to establish bias that would undermine his credibility. Accordingly, I credit his testimony and find the following, with one caveat that applies to all

[17] Tr. 2050.

witnesses who testified about soliciting: in the absence of any documentation, the dates given by witnesses on this subject generally cannot be taken as precise.

When Monzon started at the hospital in February 1994, his immediate supervisor, Carmen Cabanas, told him he could not buy or sell anything at the hospital. However, he in fact sold items from 1995 until approximately early December 2003, even though Cabanas remained his supervisor until around 2002, when Noemi Desir took over that role.

On a daily basis, Monzon sold umbrellas, perfumes, and ceramic ornaments to other employees, supervisors, physicians, or others who came by his nurses' station, sometimes on his worktime. Alicante corroborated this by testifying that she witnessed him sell perfumes.[18] The last time was in November 2003, at a nurses' station, when he was on his worktime. She did not know if the employees who purchased from him were on break or on worktime, or if any supervisors witnessed his activity. Cardenas also testified to observing him engage in sales. Monzon kept his perfumes and ornaments under the nursing station desk that Director Desir and Supervisor Elizabeth Williams used; he maintained a catalogue for the ornaments on top.

In addition to selling at the nurses' station where he was assigned, Monzon also made sales and deliveries to employees on their worktime in other departments. He had a business card, "Vakadero Perfumes The Best Prices in the Market," which he distributed to other employees and doctors.

On several occasions, Monzon sold umbrellas to Supervisor Cabanas. He also sold three or four umbrellas to Director Desir. When he last sold to Cabanas, at the end of 2001, and to Desir, at the end of 2002, he was on his worktime. In early December 2003, Desir observed him selling ornaments. He asked if she wanted to buy any. She replied no but that she wanted an umbrella, to which he responded that he did not have them any more.

Desir denied any knowledge that Monzon ever engaged in sales activities on worktime. She did corroborate his testimony in part, by testifying that she bought an umbrella from him a couple of years ago, when he came to a nursing station on his time off and was selling them. She did not consider this a violation of the no-solicitation policy because he was not working at the time. Presumably, though, other employees at the nursing station were.

Desir was not credible. I cannot believe that she did not know that Monzon was engaged in sales activities, sometimes on his or other employees' worktime, based on the above incident and the frequency and openness with which he conducted sales. I also find highly implausible her testimony that in the approximately 11 years she was med/surg director, with supervisory authority over more than 100 employees, she <u>never</u> saw any nonhospital catalogues of any kind at nurses' stations and had no knowledge that any employee ever solicited on worktime. Accordingly, I do not credit her testimony where it conflicted with Monzon's or other witnesses who testified on the subject.

No management or supervisors ever told Monzon not to sell his various wares or issued him any kind of warning.

Employees other than Monzon have engaged in solicitation for sales. Marcela Fernandez, formerly a group leader and now general supervisor of the food and nutrition

[18] Her NLRB affidavit, while not specifically mentioning Monzon, stated that employees sold jewelry, perfume, and uniforms.

services department, sold Avon products at the hospital at one time. Because Fernandez appeared to attempt to minimize the scope of her sales activities, I credit the following testimony of Monzon and Cardenas.

Monzon testified that Fernandez kept a catalogue on top of the department desk and that he personally purchased Avon products from her in February and March. He never saw other catalogues on the desk, other than his catalogue for ornaments and hers for Avon products. Cardenas observed Fernandez sell Avon products on the floors, when she brought a cart with juices and fruits upstairs to replenish the pantries. The last time was in 2003.

I do credit Fernandez' testimony, with the exception of the date she gave (December 2002), that her supervisor, Pedro Ortiz, told her that the policy of the hospital was not to allow anyone to sell products and, if she continued to do so, he would write her up. She said she would stop. She never received anything in writing. As to the date, Ortiz did not testify about the event, nothing documentary corroborates her, and I do not believe that Monzon and Cardenas would both be wrong about seeing her engage in sales activities after December 2002.

I credit the other witnesses who testified about employees (and at least one nonemployee) buying or selling, as follows.

Vasquez has seen this, "All the time." Thus, Marina Izquierdo, the unit secretary's mother and a nonemployee, comes to hospital with a large bag of perfumes on a regular basis at various times of day. During the July 4 weekend, Vasquez observed Supervisor Marissa Brown and one of the nurses buy perfume from Izquierdo on worktime. In May, while Vasquez was on worktime, she purchased a pair of earrings from Izquierdo and ordered another pair from her in September. Further, employees purchase their own uniforms, and an employee with the first name of Marina has sold uniforms on most weekends, the last occurring in early September. Vasquez purchased such from her earlier in 2004. Employees sell chocolates, usually around the holidays. The last time she observed this was in the summer.
One employee sells from her child's school catalogue, which she keeps on the table in the nurses' station. Vasquez has seen various catalogues at the nurses' station "all the time," including Victoria's Secret and Avon. On cross-examination, she testified that she has not seen any sales from the Victoria's Secret catalogues and has no direct knowledge that any supervisors ever saw them.

Alicante bought a candleholder from Theresa Gonzalez, another nurse, in December 2003. Alicante was on worktime when Gonzalez asked her and a third nurse if they wanted to buy something from a school catalogue. Also that same month, Alicante purchased a butter spreader from Director Carmen Cabanas. Alicante was in Cabanas' office on her worktime, when Cabanas showed her a catalogue and asked if she wanted to make a purchase for her (Cabanas') daughter. Alicante has not seen other catalogues at the hospital.

Cardenas observed Avon and jewelry catalogues displayed at the nurses' station in his department, up until the time he was discharged, and he witnessed two other employees sell Avon products and a third sell uniforms. However, he did not know if any supervisors were aware of these activities. Until late 2001 or early 2002, he took school catalogues to work, to sell candy bars to other employees. During the workday, he would put a box on candies on the desk, and people were free to come by and buy candy and leave money. His supervisor at the time, Maria Luzon, observed him doing this but said nothing. In fact, she herself brought in school catalogues and sold candy bars for school fund-raising, both to employees and patients.

Other employees continued to sell school candy up to the time Cardenas was discharged. Director Zuniga's testimony about not never seeing any catalogues not related to hospital business was ambiguous, in that it is unclear whether she meant only in the PT kitchen or in the whole department.

Based on all of the above, I find that solicitation and distribution for sales and purchases by employees was a common occurrence in many departments; frequently took place on employees' worktime and in work areas (sometimes, in locations that were proximate to immediate patient care areas, i.e., nurses' stations); and was often carried out with the acquiescence and, at times, direct participation of management/supervisors. Most notably, Monzon for many years openly engaged in soliciting employees and others to buy various items but was never told to stop. Prior to Camejos and Cardenas, only one employee, Fernandez, was ever disciplined for engaging in prohibited solicitation or distribution, in the form of a verbal warning.

There was also credible evidence regarding solicitation for the Florida Lottery or Lotto, in two departments: environmental services and PT. In the former, the activity is regularly conducted with Director Ricardo Crespo's knowledge, approval, and even participation. He and Floor Man Rockefeller Moreno disagreed, however, on whether such activity takes place only on employees' lunch hour (Crespo) or at all times during the day (Moreno). Both of them appeared candid, and no corroboration was offered for either version.

As to the PT department, I credit Cardenas' uncontroverted testimony that he and other employees, Director Zuniga, and patients participated in the Lotto; the last time he did so was in December 2003; and that this took place throughout the day, including on employees' worktime. However, Cardenas offered no evidence of how often the activity occurred on worktime or that Zuniga was aware that it did.

I deem the evidence insufficient to make a finding that employees in either department engaged in lottery solicitation on worktime with supervisors' knowledge.

Security personnel testified without controversion that members of religious organizations who have come to the hospital have been asked to stop soliciting. I credit this testimony.

Cardenas' Pre-discharge Activities

Cardenas was employed by the hospital since November 1994, or for over 9 years. From 1996 or 1997 on, he simultaneously encumbered the positions of physical therapist assistant and orthopedic tech in the PT department. For the last year, he worked the 7:30 a.m. – 4 p.m. shift Mondays through Fridays but was on call for other hours. Depending on workload, he usually took his lunchbreak between 12 and 1 p.m. His other breaktimes were flexible. After July 2003, his supervisor was Director Zuniga. He testified without controversion that he received no discipline prior to his discharge and, as reflected in his termination report,[19] the Respondent has not raised problems with his performance as a defense.

Cardenas engaged in a variety of union activities prior to his discharge. Starting shortly after the petition for his unit was filed on November 20, 2003, he passed out union flyers in the lobby or cafeteria two or three times a week, during lunchtime. On one such occasion, he

[19] GC Exh. 32.

testified without controversion, he attempted to give Dr. Sanjenis a flyer, but she informed him she was a supervisor. Also starting in November 2003, and continuing until his discharge, he solicited employees to sign authorization cards in the cafeteria and lobby. From the end of December 2003 on, he wore a union lanyard to work every day. Finally, he posted flyers on the bulletin board in the PT department kitchen, where employees ate lunch, took breaks, and held meetings. According to Cardenas, all of his union activities were on nonworktime.

Photography is one of Cardenas' hobbies, as both he and Zuniga testified. He took pictures in his department for every hospital-sponsored activity and also shot photographs at hospitalwide activities, such as the diversity fair. Moreover, he took pictures of coworkers and their children. Many people also took such kinds of photographs.

Charge Nurse Vasquez also testified that employees take pictures around the nurses' stations. Employee Delia Artiles, a Respondent's witness, testified with respect to her photograph, one of many photographs of employees, in Respondent's Exhibit 18. She was in a patient's room when Cardenas told her he was going to take her picture. She posed, and he took it. Immediately before or afterward, he took the picture of the coworker next to her on the photo. She did not report the incident to anyone. Her testimony reflects that she considered his activity a casual matter and not unusual or in egregious violation of hospital policy.

The Respondent has no written prohibitions or other policies concerning employees photographing other employees. Significantly, when Director Zuniga was asked about the hospital policy regarding the taking of photographs, her answer focused on patients: she testified that no pictures can be taken with patients without properly executed consent forms. She initially mentioned nothing about a prohibition against employees taking pictures of other employees. Similarly, Director Desir, when asked about the hospital policy regarding taking pictures in patient care areas, also replied that consents must be maintained again, implying that the primary concern of the hospital relates to photographs of patients.

Desir's testimony that pictures of employees are <u>never</u> taken for reasons other than for hospital-authorized activities such as nurses' week, Christmas parties, and decorating parties, was unbelievable, and I do not credit it.

Management's Actions and Decision to Discharge

Director Zuniga testified about an incident on December 1, 2003, in the gym area of the department. She was doing paperwork at the counter when she observed Cardenas come in to the gym and have a conversation with physical therapists Maritza Sablon and Carmen Derkocz. Zoila Viego, another physical therapist, was in their vicinity. Zuniga did not hear what was said, but shortly thereafter, Viego approached her and stated, "I feel like I am in Cuba again."

A few minutes later, she was still doing paperwork when Derkocz, Sablon, and Viego came over to her. Derkocz stated that she felt she was being pressured by Cardenas to sign union authorization cards. Sablon said that Cardenas had pressured her many times, and it made the atmosphere very uncomfortable for them.

The Respondent called none of these three employees to testify and provided no explanation of why they could not be available. Thus, all we have on the record is uncorroborated hearsay statements of what Cardenas may have said to them. I will not consider this testimony as evidence of the truth of the matters asserted therein.

Although Zuniga had the authority to impose discipline, all the way from verbal counseling to termination, she wanted further guidance and, on December 2 or 3, met with COO Corzo. Their versions of the meeting were generally similar, with the following exception. Zuniga testified that she reported only what the employees had said about Cardenas pressuring them to sign cards and to join the Union. Corzo, on the other hand, testified that Zuniga also mentioned union literature being distributed in the department.

After calling the hospital's attorney, Corzo directed Zuniga to make certain statements at Zuniga's next regular monthly department staff meeting. Zuniga held such meeting later that week, on December 4, 2003, and did so. She stated to the effect that employees could be for or against the Union and were not under any obligation to sign authorization cards, pressure from other employees would not be tolerated, and such behavior should be reported to Zuniga. Cardenas attended the meeting. He recalled she referred to union activity and said that if anyone was uncomfortable with what was happening, to come talk to her.

At around this time, Zuniga called Security Supervisor Arturo Padilla and told him about a union flyer being posted in the lunchroom inside the PT department. He went there and found Respondent's Exhibit 21, which he removed. This was the first one he saw. Subsequently, over a period of months, he found and removed over 100 union flyers throughout the hospital, in such places as the main lobby, bathrooms, nursing stations, and the lunchroom.

After the staff meeting, Zuniga continued to see union materials posted on the kitchen bulletin board and to receive complaints from employees that Cardenas was pressuring them to sign authorization cards. Zuniga never witnessed anyone posting.

On about January 9, Sablon told Zuniga that she was upset and frustrated because Cardenas had come to her many times with invitations to union meetings and other activities and had kept leaving union literature on her desk, even though she had told him many times that she did not want to be involved. Sablon gave Zuniga the literature.[20] Zuniga asked if Sablon had been working at the time he solicited, and she replied yes.

Zuniga went to see Corzo that afternoon. Their versions of their meeting that day and the one a couple of days later were not materially different, again with one important exception. At this first meeting, Zuniga reported to Corzo what had occurred after the staff meeting and brought the materials that Sablon had given her. Corzo stated she would consult with the hospital's attorneys.

Either at this or the second meeting, Corzo told Zuniga that she had received multiple other reports about Cardenas. Corzo and Zuniga testified differently as to the scope of those reports. According to Zuniga, they were that Cardenas had been engaged in "soliciting for the Union in patient care areas during working times."[21] Corzo's description was considerably more expansive: Cardenas had been seen during his working time "posting flyers, taking pictures, and trying to get people to sign up for the Union, and those types of things."[22]

At the second meeting, a couple of days later, Corzo called Zuniga to her office and directed her to terminate Cardenas.

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[20] R. Exhs. 45 & 46.

[21] Tr. 2174.

[22] Tr. 2732.

Zuniga's testimony regarding Cardenas was not fully credible. On direct examination, she testified about only one conversation with Corzo prior to January 9 concerning reports about Cardenas. However, on cross-examination, she contradicted that earlier testimony by stating that "multiple times" between December 4 and January 9, whenever she got information about Cardenas pressuring other employees or she would see union flyers, she made reports about him to Corzo. When then asked how many such conversations occurred, she was evasive and could not recall.

Zuniga's demeanor changed noticeably when she was relating her conversations with Corzo, in that she sounded less confident and avoided eye contact, leading me to believe that she was not comfortable in giving testimony about them and to the inference that her testimony was not fully reliable.

Finally, I take into account the Respondent's failure to call any of the employee-witnesses who allegedly complained to her about Cardenas. Since they cannot be assumed to be reasonably disposed toward any party, drawing an adverse inference would be improper. Nevertheless, such lack of corroboration can be used as a factor in determining that Zuniga was not credible. See *Port Printing Ad & Specialties*, 344 NLRB No. 34 slip op. at 4−5 fn. 9 (2005); *C & S Distributors*, 321 NLRB 404 fn. 2 (1996).

I have already detailed my reasons for not finding Corzo's testimony credible regarding the discharge of Anido. For the following reasons, I reach that same conclusion here.

The inconsistencies between her accounts of their conversations, and Zuniga's, were described above. Corzo appeared to be trying to expand the Respondent's defenses for the discharge.

Although Corzo testified that most of the time she contacts the hospital's attorneys before terminating an employee, she then could not remember any other specific instances when she has done so.

Corzo testified that other employees had made reports to her about Cardenas. When asked on cross-examination who, she first answered there were several but then could name only one, Jeanette Lago, who had allegedly seen him with a camera around his neck taking pictures in patient care areas.[23]

Finally, I asked Corzo if she had taken any notes of these other reports, and she replied no. Further, no one provided her with anything in writing concerning them. I find it simply unfathomable that a high-level manager such as Corzo would terminate an employee on the basis of complaints by other employees and yet have absolutely no documentation of such, in the way of any statements or other affirmations by the employee-witnesses.

At no time did anyone from management or supervision speak with Cardenas about the allegations against him prior to his termination interview.

[23] Lago was director of contract compliance at the time. Since she later resigned (see GC Exh. 92), I draw no adverse inference from the Respondent's not calling her as a witness.

Termination Interview on January 13

Zuniga and Bosch met with Cardenas. Bosch first cited allegations of harassment from different employees as the reason for his discharge. She concededly stated that Cardenas was discharged for soliciting employees to sign for the Union, and for passing out union literature and posting flyers on hospital property "while at work,"[24] without distinguishing by time or location. Bosch said repeatedly during the conversation that she was only a messenger for the administration, and Zuniga stated words to the effect that she had tried without success to get the administration to change the decision.[25] Both Bosch and Zuniga said he was a good worker, but Zuniga also said he had engaged in impermissible activities despite being informed that it was unacceptable.

Posttermination Events

Following his discharge, Cardenas engaged in distributing union literature[26] in the parking lot, as later discussed. He also entered the interior of the hospital on three occasions. The first two times were on January 26, to attend the pre-election conference and then to vote in the election. On the third, in late May, he provided the hospital with 10-day notice of the Union-sponsored March for Democracy march, which took place on June 5.

Attorney Ross, by separate but identical letters dated June 11 to Cardenas and Armenteros,[27] stated that, as a former employee, Armenteros or Cardenas had "regularly visited the Hospital and remained at the Hospital for hours at a time without any apparent legitimate purpose for your visits," requested that they "cease and desist from loitering and/or trespassing at the facility," and concluded with, "Consider yourself formally notified that any further invasions on your part of our Hospital will be treated as trespass and loitering on our property and the Hospital will take all appropriate civil and criminal action to remedy the situation."

C. Reymundo Camejos' Discharge on January 14

Camejos was employed as a respiratory therapist in the cardiopulmonary services since March 2003. He did not appear to try to embellish or exaggerate the facts to which he testified, and he struck me as credible, with one exception.

That was his impeachment on cross-examination relative to whether two other employees in his department engaged in the same union activities as he did. He seemed reluctant to implicate them, a sentiment I find understandable in light of his allegation that he was discharged for engaging in union activities. Moreover, I find this to be impeachment on a collateral matter not going to the substance of his termination. Other than this, Camejos' testimony was internally quite consistent on both direct and cross-examination, and I generally credit it.

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[24] Tr. 1760.

[25] Cardenas attributed this statement to Bosch, who denied making it. Zuniga, however, could not recall if she made such a comment. Her testimony about the termination interview was quite precise in general, and I would expect that she could remember unequivocally whether or not she said that. Accordingly, I find that she tacitly admitted making the remark.

[26] See, e.g., GC Exh. 34.

[27] GC Exhs. 22 & 36, respectively.

Camejos' supervisor was Edgar Diaz, who has been department director for 16 years and supervises about 25 employees. Camejos is the only employee Diaz has terminated in those 16 years. Diaz also seemed to be candid and to answer questions without trying to slant them either for or against Camejos. Therefore, his testimony is also generally credited. On many facts, Diaz' testimony was quite similar to Camejos.'

Camejos worked a 12-hour shift 3 days a week, and an 8-hour shift on 1 day. Depending on work demands, he took his morning 15-minute break between 9 and 10 a.m., and his 30-minute lunchbreak between 1:30–2 p.m. Camejos' work performance is not raised as a defense for his discharge and need not be discussed.

Camejos distributed many union flyers and solicited signatures on authorization cards at the hospital on his and other employees' nonworktime, wore a union lanyard or a union button daily at work starting in mid-November 2003, and posted several flyers on the respiratory therapy department bulletin board.

Diaz observed Camejos wearing lanyards and buttons and knew he was "very emotional" about the Union. He thought that Camejos was posting union material on the bulletin boards and department secretary's counter over a period of 1-1/2 to 2 months, starting in mid-November but never actually saw Camejos engage in this.

In mid-November 2003, Diaz called Camejos to his office. Camejos recalled that Diaz stated that Camejos and another employee were "very enthused" concerning the situation with the Union, and someone had told him that they had put union flyers on the counter and that could bring them a problem or problems. Camejos responded that he would not do such a thing because he respected Diaz a lot. Diaz' version was fairly consistent with Camejos.' However, he testified that he specified that distribution of pamphlets was illegal during "time of work." I believe that Diaz would have had a better recollection of the precise words he used than Camejos, and I find that Diaz added this clarification.

I credit Camejos' uncontroverted testimony that immediately following the conversation, Diaz went outside his office and, in front of two department secretaries, said that the Union was no good because Eastern had gone to a union and then gone on strike because the union was no good or did not function. Camejos responded that his experience was different.

Camejos further testified that Diaz held a meeting with 12−13 department employees in December. In Spanish, Diaz stated that they should be very careful voting for the Union because "it would be illegal voting against the company policy."

Diaz did not testify about this meeting, nor did any employees other than Camejos. Although I have no reason to doubt Camejos' sincerity in relating what he recalled, I find it implausible that Diaz would have used that kind of language, particularly when there was management training regarding the Union, and the complaint alleges no other violations based on what managers/supervisors told employees at group meetings, other than Director Juan Campos, who engaged in a pattern of unfair labor practices.

In view of this and the absence of any corroboration by other employees who attended the meeting, I do not find as a fact that Diaz made the statements attributed to him by Camejos. See *Port Printing Ad & Specialties*, supra at slip op. at 4−5 fn. 9; *C & S Distributors*, supra at 404 fn. 2 (administrative law judge may properly consider lack of corrorobation by employee-witnesses in evaluating whether testimony is credible).

Decision to Discharge

As with the discharge of Anido, Corzo's version of how and why management came to the decision to discharge Camejos was contradicted by the testimony of the employee's immediate supervisor. Consistent with my overall conclusions that Diaz was credible and Corzo was not, I credit Diaz' account.

According to Corzo, she had a conversation with Diaz in her office in early January. She called him because there had been reports that Camejos was overheard in a nurses' station making negative comments about the hospital to a group of employees and suggesting they get together and sue the hospital. Diaz told her he was not surprised because he had been having some problems with Camejos, who had been "for a number of weeks now distributing literature about the Union, and during working time posting pamphlets, literature on nursing floors, and in the departments, patient care areas, and this is something [Diaz] had talked to him about but he continue[d] to do."[28] Corzo then told Diaz there was a no-solicitation policy in effect which Camejos had continued to violate despite warnings and that it warranted termination.

Markedly different was Director Diaz' testimony that, after Corzo related that Camejos was making malicious statements about the hospital, he told her only that he "suspected" Camejos was the one who was posting and distributing union paraphernalia in the department. Corzo then said that there were policies and procedures in place that the hospital needed to follow and to terminate Camejos. Diaz did not tell Corzo that he had previously warned Camejos.

Termination Interview on January 14

Diaz, Bosch, and Camejos were in attendance. Diaz stated that Camejos was a very good employee, and he had no complaints about his work, but he had told Camejos that he should be very careful with the problem of the Union, which was going to get [Camejos] in trouble. There was no disagreement in the testimony of Bosch, Diaz, and Camejos concerning Bosch's stating that Camejos' termination was due to his soliciting and/or distributing activities on behalf of the Union, although they differed as to her specific words. It is clear that she said this in the context of his violating hospital policy and did not narrow the policy's prohibitions in terms of worktime or immediate patient care or work areas.

Bosch testified that she also told Camejos he had been put on notice several times but had continued to violate the no-solicitation policy to the point that he had been "insubordinate" to his supervisor. However, Diaz did not corroborate her on this, and since he was the supervisor, I would expect that he would have recalled Bosch making any such statement. I further note there is no evidence in Camejos' personnel file that he received any prior formal warnings from Diaz and no mention of "insubordination" in the e-mail memorandum of the termination meeting that Diaz later sent to Bosch.[29] For these reasons, I discredit this testimony of Bosch and find it an attempt to come up with a new ground for Camejos' termination after the fact.

Camejos was asked to sign a termination paper, but he refused because no union attorney was present. He did not read the paper or ask for or receive a copy.

[28] Tr. 2725.
[29] GC Exh. 69.

I will now address the General Counsel's request for *Bannon Mills'* sanctions for the Respondent's failure to produce the termination paper pursuant to subpoena. Bosch testified that the Respondent was "unable to locate" it. The General Counsel contends that this should result in exclusion of the testimony of the Respondent's witnesses and of its documentary evidence, including Diaz' e-mail to Bosch, regarding Camejos' termination.

That such a document existed is clear. Diaz corroborated Camejos' testimony that Camejos was presented with a termination report, and Diaz was fairly certain that he completed it. Further, HR Benefits Representative Mirelis Asper testified that there was a termination report for Camejos, because at one point during Anido's unemployment proceedings, she confused it with Anido's.

Obviously, the claim of "lost" or "misplaced" can be a convenient subterfuge for not turning over a document that contains admissions against interest or otherwise is deemed damaging to a respondent's case. The primary question, therefore, is whether the Respondent's failure to produce the document resulted from its proffered explanation or from a willful refusal or bad-faith effort to search for and locate it. *Champ Corp.*, 291 NLRB 803 (1988). See also *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); *Midwest Hanger Co.*, 221 NLRB 911, 926 fn. 61 (1975).

Although I find Bosch's credibility lacking in other portions of her testimony, this does not mean that I must find her untruthful on everything. See *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). I do find it strange that the Respondent would have lost or misplaced a document as important as a termination paper. Nevertheless, of the myriad of documents subpoenaed, this was the only one not produced. In view of this, I decline to impute improper motives to the Respondent, accept its explanation, and will not impose sanctions for its nonproduction.

D. *Pedro Armenteros' discharge on February 23*

Armenteros testified without controversion about the nature of his employment as a courier and his interface with Drs. Mora and Sanjenis and Office Manager Janet Cabrera. He appeared candid, and other witnesses with direct knowledge corroborated him. The Respondent offered only hearsay evidence in rebuttal. Accordingly, I credit his testimony.

Armenteros was employed since October 1985. His testimony about his employment history at the hospital was somewhat confusing, but I take into account that it covered over 18 years and included several different positions. He first was a security guard for several years and then began performing courier duties, to which he was formally reclassified in 1999 or 2000. His duties remained the same after the reclassification.

Armenteros was always paid by the hospital, and administration staff filled out his time cards. Drs. Mora and Sanjenis were his immediate supervisors. Mora either called him directly or relayed assignments to him through Cabrera. Sometimes, Mora communicated his assignments through hospital administration staff, including, during the last several months, Executive Director Sanchez. Armenteros received his last evaluation in August 2003, covering the period from April 2002—April 2003.[30]

[30] GC Exh. 20.

As a courier, Armenteros drove both a leased limousine and a hospital van until early 2003, when the lease for the limousine expired; thereafter, he drove only the van. He normally worked 5 days a week, but occasionally on weekends. His primary responsibility was to serve, effectively, as a personal chauffeur for the Mora family. Not only did he take Dr. Mora to the hospital or his own medical office at the medical group, but he also would take Mora's children to and from school and doctor's appointments and other places, and Dr. Sanjenis' mother to the doctor. He would clock in at the hospital and then go to the Mora home. Director Rodriguez, who worked for the hospital from 1970 until late February, confirmed that Armenteros was primarily a chauffeur for the Mora family, and Isidro Valladares, a former lab messenger, observed Armenteros make numerous deliveries to the medical group over a period of years.

Secondarily, for only several hours a week, Armenteros performed duties more directly associated with the hospital, such as taking Dr. Sanjenis to monthly board meetings, taking deposits to the bank, going to attorneys' offices to deliver checks or documents, or making other deliveries.

Armenteros signed an authorization card on November 20, 2003.[31] He never wore any union sticker or other insignia.

Statements Attributed to Dr. Mora

I credit the following unrebutted testimony of Armenteros and Director Rodriguez. Although Rodriguez had a personal friendship with Armenteros, was terminated, and is currently engaged in litigation with the hospital, I find that he was a credible witness. He appeared to be straight forward in answering questions, has never been a union member and made no contention that his own termination was due to anything other than Dr. Mora's believing he put on a convention without Mora's consent.

Dr. Mora knew that Rodriguez and Armenteros were friends. In December 2003, Mora called Rodriguez and asked if he knew that Armenteros was involved in the Union. Mora stated that if Armenteros were so involved, Mora would have him fired, and the same would go for Armenteros' wife and daughter. As to the latter, who was on maternity leave, Mora said, "[W]hen she comes back, I'll fire her too because I have fought the Union for five times and I've won all the time."[32] Rodriguez responded that Armenteros had nothing to do with the Union. A few days later, Mora called him again. This time, Mora asked if Rodriguez knew if a certain physician was involved with the Union. Rodriguez replied that he did not think that a doctor would be.

On about December 30, 2003, Cabrera called Armenteros. She told him that Dr. Mora had found out he had filled out a card and that he either was already fired or was going to be fired. Further, if his wife and daughter (who also worked at the hospital) had filled out cards, they also would be fired. She told him that, as per Mora's orders, he was to report the following morning to see the hospital's attorneys. However, when he went to the administration offices the next day, CNO Sosa-Guerrero told him that it was a misunderstanding and that they did not need to see him.

[31] GC Exh. 24.
[32] Tr. 1566.

On January 13 or 14, Armenteros had a conversation with Rodriquez while they were having lunch at the hospital. They were social friends and regularly met for lunch. Similar to what Cabrera had said, Rodriguez stated that Dr. Mora had told him that Armenteros had filled out a union card and, if that was the case, Armenteros was going to be fired from the hospital, and the same went for his wife and daughter. Armenteros replied that they were in a free country, not Cuba, and it was his right to be part of the Union.

Decision to Discharge

Executive Director Sanchez was responsible for the decision to discharge Armenteros. According to Sanchez, he had found out that Rodriguez was engaging in a side business in connection with the CMC and using it for a personal gain, and because of the hospital's efforts to cut costs, he called Bosch in to his office in January or February and told her to terminate Rodriquez immediately. According to Sanchez, Bosch volunteered sua sponte that she had found another '"phantom employee," who was Armenteros.

Bosch did not testify about this conversation and thus did not corroborate him. On the contrary, she testified that she played no part in the decision to terminate Armenteros. That aside, It strikes me as implausible that she would have brought up Armenteros, particularly when she has responsibility for all employees at the hospital and limited firsthand knowledge of their day-to-day work. Further, from her demeanor as a witness and other record evidence, Bosch appears to have something of a protective attitude toward employees in general, and I doubt if she would have initiated action against an employee, as claimed by Sanchez.

Sanchez testified that after Bosch's remark, he had Armenteros' file brought to him. He learned that Armenteros was being paid and enjoyed certain "perks," such as a paid company car, paid car expenses, and paid insurance. He concluded that Sanchez cost the hospital between $50,000 and $60,000 a year in salary and benefits. Sanchez allegedly inquired of the secretaries on the administrative staff what Armenteros did and why he was never around, but no one knew, and he was told that Armenteros was a courier for "the Administrator's Office and nobody else." He became "very upset that we had somebody who was basically collecting a salary and not doing any work."[33]

Sanchez came to these conclusions and made the decision to terminate Armenteros with out ever communicating, either directly or indirectly, with Armenteros or, according to his own testimony, with Drs. Mora or Sanjenis, for whom Armenteros performed most of his work. I cannot believe that Sanchez had no awareness, either personal or from others in administration, that Armenteros served as a chauffeur for the Mora family. It is noteworthy that Sanchez never specified who told him that Armenteros was a courier solely for the administrator's office, and the Respondent called no one to corroborate Sanchez on this point.

Further shedding doubt on Sanchez' credibility was his professed inability to recall whether Dr. Mora attended any meetings between hospital management and company attorneys with regard to the Union. As I stated with regard to CNO Sosa-Guerrero, Mora was too important a personage at the hospital to be forgotten, and I do not consider this claimed failure of memory believable. It is yet another indication that Sanchez was less than fully forthright and another reason I do not credit his testimony as to why the Respondent discharged Armenteros.

[33] Tr. 2573.

Termination Interview on February 23

Bosch met with Armenteros. She told him she was sorry to have to tell him, but by order of the administration, his position had been eliminated starting that day. He would receive pay for 15 days and vacation pay. She gave him a paper to sign, which he did.[34]

Posttermination Events

Following his discharge, Armenteros returned to the hospital to pick up his check and, later, for tri-annual followup scans as a cancer patient. He also went there to visit patients, to drop his wife off to work, and to visit his daughter's department and say hello.

I described the June 11 letter Attorney Ross sent to Armenteros in the section on Cardenas' discharge.

E. Hector Gonzalez' Discharge on May 14

Gonzalez was employed since June 1988. For the last 6 or 7 years, Pedro Ortiz, director of food and nutrition services (food services), was his supervisor.

Until November 2000, when he suffered a shoulder injury at work, Gonzalez was a sanitation aide. He had surgery 3 months later, followed by physical therapy. He returned to work on light duty, with restrictions imposed by his treating physician, Jacqueline Redondo, that included no lifting above his right shoulder. For a couple of months, he was assigned to be sandwich/salad maker and thereafter was put in the cafeteria aide position, filling in products and preparing the counters. The latter was more physically demanding than sandwich/salad maker but less so than sanitation aide.[35] The only physical problem he had as a cafeteria aide was in taking down trays from the cafeteria cart, for which he sometimes needed the help of another employee.

Ortiz testified that Gonzalez could not lift anything, even in a light duty position, and someone had to come and lift for him, and that he performed only about 50 percent of what other people in the cafeteria did. Nothing documentary supports these assertions, and there is no evidence that Gonzalez was ever told he was inadequately performing his duties as a cafeteria aide or that his position as such was only temporary.

Over a period of time, Dr. Redondo completed a number of medical restrictions reports for Gonzalez, which Gonzalez submitted to Ortiz. Her work status report dated November 8, 2001, stated, "No lifting over level shoulder. *Permanent.*" The limitation in her February 28, 2002, report was that Gonzalez not lift over 10 pounds, and she stated in her August 15, 2002, report, "No overhead lifting over R shoulder is permanent," a conclusion she repeated in subsequent reports. In her April 17, 2003, report, Redondo eased Gonzalez' restrictions by removing the 10-pound overhead lifting limitation and replacing it with overhead lifting activity limited to tolerance.[36]

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[34] It is not in the record.

[35] Compare GC Exh. 121 (cafeteria aide job description) & R. Exh. 27 (job description Gonzalez received as sandwich/salad maker). Ortiz testified that most employees in the department perform the duties of both cafeteria aide and sanitation aide, regardless of title.

[36] The reports described in this paragraph are, in chronological order, GC Exh. 192, R. Exh. 28, R. Exh. 98, & GC Exh.197.

Prior to his discharge from the hospital, Gonzalez worked as a part-time bag boy for Publix market for approximately 13 years. Bosch conceded that the hospital was aware for years that Gonzalez held this second job. On cross-examination, Gonzalez volunteered that he continues to work there still. He testified without controversion that the job involves no lifting that causes him any problems.

Starting in December 2003, Gonzalez became active in union activities. He began wearing union lanyards and stickers daily at work, as did most other kitchen employees, and started distributing union pamphlets three or four times a month on breaks or in the parking lot after his shift (5:30 a.m. to 2 p.m.). His picture appeared in a union campaign flyer,[37] which was widely distributed in the hospital, and on the day of the election, January 26, he was among a group of 30 or so union supporters celebrating the Union's victory. Their photographs were taken and circulated by the media. He also distributed authorization cards but had no direct evidence of management knowledge of this.

Decision to Discharge

Lorenzo Rodriguez has been safety manager since May, in charge of the entire employee safety program, which includes handling workers compensation claims. Rodriguez' investigation and recommendation led to Gonzalez' termination.

Rodriguez testified that the first thing he did when he was hired was to review the hospital's workers compensation program and the 30 or so open cases. In Gonzalez' file, he noticed the following factors. The injury had occurred 4 years ago but the claim was still continuing. Gonzalez had been on light duty for 2 years. The treating doctor had said his restrictions were permanent and involved reaching overhead. Gonzalez had surgery for rotator cup repair but there was a notation there had been loss of the repair. He had another job as a stock clerk that could have caused this loss. According to Rodriguez, these were all "red flags," especially Gonzalez being on light duty assignment for over 2 years, because they meant his inability to perform the essential elements of the job. Light duty, Rodriguez stated, is a temporary measure meant to help the person to rehabilitate to full duty. He also saw indications in the files that the hospital recognized that Gonzalez had been in the job for a long time and also that the hospital had wanted to terminate him because he was not able to perform the duties of sanitation aide but feared an Americans with Disabilities Act (ADA) claim.[38]

After this review, Rodriguez recommended that Gonzalez be terminated because: (1) his restrictions preclude him from performing the essential elements of his job with or without a reasonable accommodation; (2) he had been on temporary light duty assignment since 2002. Rodriquez based the first conclusion on Dr. Redondo's stating that Gonzalez' inability to do overhead work was permanent, meaning no further rehabilitation was possible. Therefore, Gonzalez could not perform the job requirements of sanitation aide or cafeteria aide.

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[37] GC Exh. 34. Numerous employees were pictured.

[38] Ortiz testified about two conversations he had to this effect with Bosch and Gina Perez of HR, one at the end of 2002, and the other several months later. See also R. Exh. 104, a memo dated October 9, 2003, from Bosch to Corzo. Bosch noted that Gonzalez' only restriction was not being able to do overhead reaching, and she raised the possibility of his being placed in a position requiring only sitting.

Rodriguez testified that the fact that Gonzalez had another job "really weighed" in the decision to recommend he be discharged, because the activities Gonzalez performed as stock clerk could result in injury that could subject the hospital to further worker's compensation exposure. However, Gonzalez testified he was a bag boy, not a stock clerk, and Rodriguez never inquired of either Gonzalez or Publix exactly what Gonzalez' job duties were. The absence of meaningful investigation raises a question of whether Rodriguez' conclusions were based on bona fide assessment or were pretextual and suggests lack of credibility.

Rodriguez' credibility was also undermined by the following. He first testified that he did not believe there was a replacement for Gonzalez, but in his June NLRB affidavit only a few months earlier, he stated that the Respondent hired a woman to replace Gonzalez. Rodriguez also first testified that he did not recall if Gonzalez was performing the same job in 2004 that he performed before February 28, 2002 (when Dr. Redondo stated he could not lift anything over 10 pounds). In that same affidavit, however, he said that Gonzalez did perform the same job before and after that date.

Rodriguez detailed his findings to Ortiz, who agreed with Rodriguez' recommendation to terminate Gonzalez. They then met with Corzo, Rodriguez' superior, who gave final approval for the discharge.

Mercedes Garcia

During this period, another employee under Ortiz' supervision, Mercedes Garcia, also had a longstanding workers' compensation claim and permanent medical restrictions as to lifting (no overhead and not over 20 pounds occasionally). To accommodate these restrictions, she was offered a temporary position as team leader, which was less physically demanding and required less lifting than either sanitation or cafeteria aide. Because Garcia said she could not push a heavy door upstairs, she was relieved from that responsibility.[39] Further, in discussing Garcia's situation, Rodriguez and Ortiz agreed that if any overhead lifting needed was needed as part of her job duties, she would be helped by either sanitation aides or cafeteria aides. Garcia turned down the team leader position offered to her on the same day that Gonzalez was discharged.

Ortiz testified that Gonzalez was not offered a team leader position because he did not have the requisite skills and was not offered a cashiering position because his job at Publix would not allow flexibility of schedule. Ortiz never asked Gonzalez if he wanted the cashiering job.

I do not credit Ortiz' testimony that he knew Garcia was a union supporter but had no knowledge that Gonzalez was also one, since I credit Gonzalez' testimony that he wore union insignia to work daily and engaged in other covert union activities. Further, Ortiz was frequently vague or evasive when questioned on cross-examination about Garcia. These factors detract from his overall credibility, especially when considering that fairly recent events were involved.

Termination Interview on May 14

Ortiz and his assistant, Bosch, and Gonzalez were in attendance. Ortiz stated that Gonzalez was terminated because of his injury, and Bosch reiterated this. Ortiz gave him the

[39] See GC Exh. 141.

termination form[40] and had it read to him in Spanish. It stated that because he had reached maximum medical improvement (MMI) on May 15, 2003, and the doctor imposed permanent restriction of no lifting overhead, his "temporary assignment" from March 2002 could not continue, and they could not use him any more.

Although the Respondent has asserted the existence of a report from Dr. Redondo dated May 15, 2003, stating that Gonzalez had reached MMI, no such document was produced.

F. Failure to rehire Felipe Hernandez

Hernandez did not testify at the hearing, because he was recovering from surgery. Information about his situation came primarily from Director Ortiz, his supervisor, and HR Director Bosch. The Respondent did not call HR Generalist Gina Perez, who is in charge of all employment applications.

Hernandez was a cook in food services. Ortiz knew that he was a union supporter because he wore lanyards and SEIU buttons at work. Hernandez was laid off on January 23 when the food kiosk was closed down and his position eliminated. An NLRB charge was filed over his layoff.

During the first week of May, Hernandez went to HR and obtained and completed an employment application.[41] In the portion for position applied for, he wrote, "(o)pen kitchen." He was never contacted for work. Ortiz was aware that Hernandez applied for a position and wanted him rehired, apparently to fill a sanitation aide opening.

When there is a vacancy in food services, Ortega fills out a job requisition and sends it to HR, which posts the position and its qualifications. HR handles applications and forwards them to Ortiz, who has ultimate authority to hire or not hire. If no vacancy exists in food services and an application for a position there comes in, Ortiz would never see it. However, Ortiz does has the authority to directly hire for a vacancy, in which event, at Ortiz' discretion, the applicant need not specify a job title. Director Delgado's gave a similar description of the application and hiring process for his department, and I credit this portion of Ortiz' testimony.

There were vacancies in food services at around the time Hernandez applied. On April 22, the hospital's weekly job announcements posting listed the positions of cafeteria aide and sanitation aide, and the posting for May 1 listed a vacancy for cafeteria aide.[42] Bosch testified that on about May 11, the Respondent decided to hire Dilia Sanchez for one of the cafeteria aide positions. She had not previously worked for the hospital. Efforts to contact her were unsuccessful. Applicants with no prior hospital experience eventually filled the three positions.

Bosch testified that when an application is received for a vacant position, it is logged in and given to Perez, who handles recruitment for the hospital. After screening applications for qualifications, Perez forwards them to the corresponding director. If there is no vacancy for the position listed in the application, the application is filed in a filing cabinet, by job code and not in

[40] R. Exh. 58.

[41] GC Exh. 82, which he dated May 4. The HR log (R. Exh. 108 at 2) has May 13 as its filing date. Bosch testified it was received by mail that day.

[42] GC Exhs. 119(c) at 3 & 119(d) at 3, respectively.

alphabetical order by name of applicant. It is not looked at again, unless the position specified is hard to fill.

Although Bosch stated emphatically that applications listing no specific position are rejected and also filed away, other applicants who did not list a specific position were considered for employment during the same period Hernandez applied. Thus, Sanchez was offered a cafeteria aide position even though she wrote only "kitchen" on her application.[43] Similarly, the Respondent hired Ana Hernandez (no relation), another new employee, as a cafeteria aide starting on May 21, although she had only written "any" in the position portion of the application and not even specified a department.[44] Based on this treatment of other applicants, I find, contrary to Bosch's assertion, that HR does accept and forward to department supervisors applications that do not specify a particular position.

Other aspects of Bosch's testimony further undermined her credibility. She testified that she could recall no employee whose position was eliminated for whom the hospital had another job and, further, that she would know if this happened most of the time. Yet, the testimony of Directors Crespo and Delgado establishes that in recent months, at least two employees whose positions were abolished filled vacancies in other departments rather than been terminated and that this is not an uncommon occurrence.

Bosch also gave directly conflicting testimony on the length of time the Respondent maintains applications that are filed, initially testifying 6 months but later stating 1 year. This is a straightforward matter, on which I would expect a straightforward answer from the head of HR.

Finally, Bosch was frequently tentative and uncertain in testifying about Hernandez and Sanchez, whether intentionally evasive or just simply due to lack of first-hand knowledge. In this regard, Bosch testified that she was not the one responsible for the lack of action on Hernandez' application, which means that the Respondent did not call the person or persons who were.

For all of the above reasons, Bosch was not a reliable witness regarding why the Respondent did not contact Hernandez after he filed an application for rehire.

ALLEGATIONS OF PROHIBITING EMPLOYEE DISTRIBUTION OF UNION LITERATURE DURING NONWORK TIME IN NONPATIENT CARE, NONWORK AREAS

Unless otherwise indicated, all of the following allegations concern events that took place when employees and others were distributing union literature in the hospital's main parking lot. Witnesses of both the General Counsel and the Respondent were generally consistent as far as the interaction between those who were distributing and security personnel.

Alfredo Padilla, director of security, has encumbered his position for about 7 years and oversees the entire security department of approximately 15 security officers. In his absence, three group leaders (or team leaders) and three acting group leaders are in charge and direct the security officers.

[43] GC Exh. 88.
[44] R. Exh. 60.

The testimony of Cardenas and of Director Padilla and Group Leader David Diaz makes it clear that, although it may be prohibited by hospital policy, persons have engaged and continue to engage in washing cars in the parking lot and in placing flyers for car washes under the windshield wipers of parked cars. However, inasmuch as there is no evidence that such persons are employees, it cannot be concluded that any disciplinary action could be taken against them for such activity. There is no evidence that any of those individuals have ever been arrested for trespass.

The specific allegations follow.

A. On December 18, 2003, by David Diaz, group leader.

Diaz confirmed his notation in the December 18, 2003, security log that he asked several employees who were giving out "union paper" without authorization "not to."[45]

B. On January 22, by Diaz.

In January, Cardenas and others were engaged in distributing, when Padilla and Diaz told him to stop because he did not have authorization from the administration. One such occasion was on January 22, as documented by Diaz in an incident report.[46]

In January, Charge Nurses Alicante and Vasquez together engaged in distributing flyers and other paraphernalia, on their nonwork days. They testified about three incidents, the first on January 22. That morning, Diaz approached them and stated they were not allowed to distribute the flyers because it was private property. Alicante asked who was the person who had told him to tell them. Diaz gave her the policy to read.[47] Since people no longer at the hospital signed it, Alicante questioned whether it was valid. Alicante and Vasquez did leave. Diaz' testimony was substantially the same as theirs.

C. On about January 26, by Diaz and Alfredo Padilla, director of security.

The second two incidents involving Alicante and Vasquez took place on this date. They were distributing flyers in the morning when one or two security guards approached and stated they could not distribute them, after which Alicante and Vasquez left. Their testimony differed as to whether it was one or two guards and also as to the exact time the incident occurred. Neither identified a guard by name.

In the early afternoon, they returned and sat in the shed located in the parking lot area. Vasquez recalled that Diaz and Padilla came in and that the latter told them to stop what they were doing, because it was putting them (security) in a very uncomfortable position. Alicante, on the other hand, testified that only one security guard whom she did not recognize came in and said they could not distribute anything.

Neither Diaz nor Padilla testified about such an incident. Since Alicante named Diaz as the security guard who spoke to them on January 22, her testimony that she did not recognize

[45] GC Exh. 181(a) at 24.

[46] GC Exh. 188.

[47] Consistent with Diaz, Alicante testified that it was R. Exh. 24, signed by CEO Roberto Trejidor in April 1994. Vasquez testified it was not R. Exh. 24 but a document signed by someone else.

the guard on January 26 was inconsistent with Vasquez' testimony that Diaz came in to the shed that afternoon.

In the absence of any identification of the security guards in the morning and the lack of consistent identification of those in the afternoon, I cannot make findings of fact as to who they were. It follows that this allegation fails.

D. On April 20, by Cristobal Airado, security officer.

Diaz' testimony and the security log entry of April 20[48] reflect that Airado saw several people by the bridge giving flyers and told them not to.

E. On May 3, by Diaz; on about May 5, by Padilla; and on about May 19, by Diaz.

On at least three occasions, starting in early May, Cardenas distributed flyers for the Union's June 5 March for Democracy. Felix Monzon was with him on some of those occasions, as was Carmen Duran. Cardenas had been discharged by these times, but Monzon and Duran were still hospital employees.

The security log of May 3,[49] and the testimony of Cardenas and Diaz, establish that on that day, Cardenas and two others were distributing by the bridge, and Diaz told them they needed approval for the administration and to stop. They did so.

On about May 5, while engaged in distributing, Cardenas had a conversation with Padilla. Hospital employees and union organizers were also present. Padilla stated that the administration had said they would have to leave the premises and it was bad for their jobs (security personnel) if they kept doing that. Cardenas replied they did not want to get the security people in trouble with the administration, and they then left. Monzon testified that on two or three occasions in May, when he was distributing flyers on his breaktime with Cardenas, Padilla told them to move because the administration said they could not distribute there because it was private property.

On about May 19, Cardenas testified without controversion, he was engaged in distribution when Diaz came over. Again, employees and union organizers were in the immediate area. Diaz said basically the same thing as Padilla had on May 5.

F. In around late May, by Juan Rivera, group leader.

Cardenas further testified that in late May, in similar circumstances, a security guard came over and made similar statements. Cardenas could not identify the individual on the record and stated that he believed but was not certain that the individual was evening shift supervisor. Even if Juan Rivera was the evening group leader or supervisor at the time, Cardenas' testimony was too uncertain to make a finding as to whom the security officer was. On that basis, this allegation fails.

G. On June 2, by Diaz; and on June 4, by Joaquin Trista and Alberto Villages, group leaders.

[48] GC Exh. 181(b) at 6.
[49] GC Exh. 181(b) at 11.

Diaz confirmed a June 2 security log entry of June 2[50] that on that date, he told three individuals distributing literature not to be giving out propaganda and to move off hospital property.

A security log entry and an incident report of June 4,[51] as well as Trista's testimony, establish that on that date, Trista and Vallarez observed Cardenas and a presumed nonemployee engage in union activity; i.e., stopping employees in the parking lot as they left the hospital and giving them papers. Trista and Vallarez told them that they could not distribute any propaganda on the hospital's premises and to leave. They did. Although Trista testified that Cardenas and the other individual were causing a congregation of people by the entrance and a potential safety hazard, there is no mention of this whatsoever in either the security log or the incident report, and I do not find this to be a fact.

I find that in all the above incidents, the sole conduct viewed as prohibited by the security officers was the act of distribution itself, and that was reflected in what they said to employees engaging in that activity.

Analysis and Conclusions of Law

Independent 8(a) (1) allegations

A. Director Juan Campos:

1. On about December 23 and 24, 2003, told employees not to discuss employment matters concerning their mutual aid and protection with coworkers.

2. In about December 2003, and between January 15 and 26, threatened to replace employees with outside contractors if they supported the Union or engaged in concerted protected activities.

3. In about early January, interrogated employees about their union activities and told them it would be futile for them to select the Union as their collective-bargaining representative.

4. In about mid-January, impliedly threatened employees with unspecified reprisals by telling them they were disloyal because they supported the Union and engaged in concerted protected activities.

5. On about January 15, instructed employees to remove union insignia.

6. Between about January 15 and January 26, threatened to rescind an "open door" policy if employees selected the Union as their collective-bargaining representative.

The Respondent having admitted all of these allegations, I sustain them as violations of Section 8(a)(1).

B. Director Edgar Diaz, in about late December 2003, impliedly threatened employees with unspecified reprisals if they engaged in union activities.

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[50] GC Exh. 181(b) at 24.

[51] GC Exh. 181(b) at 26 & R. Exh. 37, respectively.

This relates to the conversation between Diaz and Camejos in approximately mid-November 2003. Diaz made the remark about Camejos having a problem or problems in connection with having distributed union flyers in the department. However, in this connection, Diaz told him that such distribution was illegal during "time of work."

Contrary to the argument in the General Counsel's brief, Diaz' use of the phrase "time of work" was not improper, since the Board has found rules restricting solicitation and distribution on "working time" to be presumptively valid, as opposed to those using the terminology, "working hours" or other wording suggesting that the prohibition covers the entire workday, including lunch and other breaks. *Brockton Hospital*, 333 NLRB 1367 (2001); *S. E. Nichols, Inc.,* 284 NLRB 556 (1987); *Our Way*, supra. Included in the latter category is the term "company time," the language at issue in *RCN Corp.*, 333 NLRB 295 (2002), cited in the General Counsel's brief; see also *M.J. Mechanical Services,* 324 NLRB 812, 813 (1997). Thus, with his clarification, Diaz was making a statement of the law rather than an unlawful threat.

After the conversation, Diaz went outside his office and, in the presence of Camejos and two department secretaries, stated that the Union was not good because Eastern had gone to a union and then gone on strike. I do not conclude that that Diaz' remarks were coercive as threatening. The comments were vague and ambiguous and did not state or imply the inevitability of a strike if the Union became the hospital's employees' collective-bargaining representative. See *Embossing Printers*, 268 NLRB 710, 715 (1982) contrast *Smithfield Packing Co.*, 344 NLRB No. 1 (2004); *Wilkie Metal Products*, 333 NLRB 603 (2001). In making this determination, I have considered the totality of the surrounding circumstances, in particular, the legality of Camejos' statements in his immediately preceding conversation with Camejos and the casualness with which these comments were made. See *Ebenezer Rail Car Services*, 333 NLRB 167 fn. 2 (2001); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

Therefore, I recommend dismissal of this allegation.

C. Office Manager Janet Cabrera, on about December 30, 2003, created the impression of surveillance of employees' union activities and threatened employees with discharge in retaliation for engaging in those activities. Directly related is the allegation that Board Member Dr. Modesto Mora, on the same date, impliedly threatened employees with discharge in retaliation for their union activities.

Armenteros' unrebutted and credited testimony is that when Cabrera called him on December 30, she stated that Dr. Mora had said he found out about Armenteros filing out a union card and that if Armenteros had filled out that union card, he was going to be fired or was already fired and, further, the same would happen to Armenteros' wife and daughter if they filled out cards.

Having found Cabrera an agent of the hospital within the meaning of Section 2(13), I sustain the above allegations of violation of Section 8(a) (1) of the Act.

The General Counsel contends that Cabrera's statements to Armenteros above should be directly imputable to Dr. Mora, so that, in essence, the threats she made to Armenteros on behalf of Mora should constitute double violations of the Act—by her, and also by Mora. Since Cabrera's threats were uttered once and by Cabrera alone, I find it unnecessary and inappropriate to find a second and separate violation by Mora for the same words and recommend dismissal of this allegation. The cases cited in the General Counsel's brief do not dictate a contrary result.

D. Director Vicente Rodriguez, on about January 13 or 14, threatened employees with discharge in retaliation for their union activities.

Rodriguez told Armenteros that Dr. Mora said he would discharge Armenteros and his wife and daughter if they signed union authorization cards. I have determined that Rodriguez was a managerial employee and an agent of the Respondent under Section 2(13) of the Act. The fact that Armenteros and Rodriguez frequently had lunch together and even may have been close personal friends is immaterial, inasmuch as the test for determining whether Rodriguez' statements were coercive is based on an objective, rather than subjective, standard; to wit, whether they reasonably tended to interfere with the free exercise of Armenteros' protected rights. See *Southwire Co.*, 282 NLRB 916, 917−918 (1987); *Florida Steel Corp.*, 224 NLRB 45 fn. 1 (1976); *Hanes Hoisery*, 219 NLRB 338 (1975). Threatening an employee and his family members with discharge because they signed authorization cards certainly meets this test, and I sustain the allegation.

E. HR Director Delsie Bosch, on about January 13, informed employees that they were discharged due to their union activities; and on about January 14, informed employees they were prohibited from engaging in union activities at work.

These relate to Bosch's termination interviews with Cardenas and Camejos, respectively. As to Cardenas, Bosch admitted told him on January 13 that he was being discharged for soliciting employees to sign union authorization cards, passing out union literature, and posting flyers on hospital property "while at work," a phrase that connotes the entire workday, including nonworktime. Its use was therefore improper. See *Chartwells Compass Group, U.S.A.*, 342 NLRB No. 121 (2004); See also *Our Way*, supra. By indicating that the Respondent was relying on an overly broad no-solicitation/no-distribution rule as the ground for an employee's discharge, she violated Section 8(a)(1) on that basis. The above allegation seems too expansive, and I narrow my finding of a violation to this.

During Camejos' termination interview the following day, Bosch said that soliciting and distribution for the Union was prohibited by hospital policy, without distinguishing between employee's worktime and nonworktime. Therefore, I draw the same conclusion and find that the violation was in Bosch stating that the hospital could enforce an overly broad no-solicitation/no-distribution rule.

F. Prohibited employees from distributing union literature during nonworktime in nonpatient care, nonwork areas (to wit, the main parking lot).

There can be no reasonable contention, and the Respondent does not suggest, that the parking lot was a patient care area or otherwise a work area of the hospital. Nor is there any claim that any of the employees who distributed there were on their worktime. As noted earlier, the sole conduct the security guards saw was improper, and sought to stop, was the act of distributing union literature.

In this regard, even though Cardenas had already been discharged when the incidents involving him occurred, nothing in the security logs or the testimony of the security officers states or implies that the security department saw his offense as trespassing separate and apart from engaging in distribution that violated hospital policy. Therefore, the Respondent cannot now successfully advance as an additional defense, after the fact, that he was an ex-employee trespasser, as asserted in Ross' June 11 letter and in the Respondent's brief.

Cardenas' status aside, current employees were distributing union literature along with him or, at the very least, were in the immediate vicinity when the security officers told him to stop. Since other employees overheard the statements made by security officers to Cardenas, the statements, if found unlawful, were violations of Section 8(a)(1) as to those employees. See *Family Nursing Home* 295 NLRB 923, 926 (1989); *Southern Maryland Hospital Center* 294 NLRB 823, 824 (1989).

Based on the above law and analysis, and the facts as previously set forth, I sustain the following allegations of interference with employees who were engaged in distributing union literature.

1. On December 18, 2003, Group Leader David Diaz asked several employees to stop distributing because they did not have permission from the hospital's administration.

2. On January 22, Diaz told Cardenas to stop distributing because he did not have authorization from the administration. On about this date, in the morning, Diaz told Alicante and Vasquez and stated they were not allowed to distribute because it was private property.

3. On April 20, Security Officer Cristobal Airado told several people by the bridge not to distribute.

4. On May 3, Diaz told Cardenas and others that they needed approval from the administration and to stop distributing.

5. On May 5 and on about May 19, Director of Security Alfredo Padilla and Diaz, respectively, told Cardenas and others that the administration had said they would have to leave the premises.

6. On June 2, Diaz told three individuals not to give out propaganda and to move off hospital property.

7. On June 4, Group Leaders Joaquin Trista and Alberto Vallarez told Cardenas and others that they could not distribute any propaganda on the hospital's premises and to leave.

G. The Respondent, by Ross' June 11 letter, threatened employees with civil or criminal action in retaliation for their union activities.

Both Cardenas and Armenteros received identical letters. All of the former's post-discharge presence at the hospital was connected with protected union activity or with NLRB processes. Accordingly, I conclude that the letter, which told him to "cease and desist from loitering and/or trespassing at the facility" or face "all appropriate civil and criminal action" constituted an unlawful threat in violation of Section 8(a)(1).

Armenteros, on the other hand, returned to the hospital after his discharge for only personal reasons: to pick up his check, go for tri-annual followup scans as a cancer patient, visit patients, drop his wife off to work, or visit his daughter's department and say hello. To the extent that Armenteros went to the hospital to pick up his final check or as a patient, the Respondent cannot seriously argue that he was a trespasser.

Regarding the other reasons, the Respondent provided no documentation or other evidence to show that Armenteros abused visiting privileges afforded to all members of the public, went into nonpublic areas, or interfered with the work of employees, hospital business, or patient care. In such circumstances, a reasonable person in Armenteros' position could logically have concluded that the hospital did not want him on the premises because he had engaged in union activities, especially after what Cabrera and Rodriguez had communicated to him about Dr. Mora's sentiments. Accordingly, I conclude that the June 11 letter to Armenteros also amounted to an unlawful threat under Section 8(a) (1).

Therefore, this allegation is sustained as to both Armenteros and Cardenas.

Violations of Section 8(a) (3) and (1)

The Respondent has admitted, and I find, that Director Campos violated Section 8(a) (3) and (1) of the Act by issuing written warnings on about December 23, 2003, to Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia, because they engaged in concerted protected activities by requesting and obtaining permission to leave a training meeting conducted solely in English.

The Alleged Discriminatees

The framework for analysis is *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983) *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems,* 330 NLRB 1170 (2000) *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

The Respondent's counsel has emphasized that the hospital still employs many known union adherents. However, this fact does not serve as evidence that the Respondent's actions against the alleged discriminatees were not motivated by antiunion animus. An employer's unlawful discrimination against some union supporters and activists is not negated simply

because the employer did not discriminate against all union supporters. *Handicabs*, *Inc.,* 318 NLRB 890, 997−898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996). Indeed, the chilling effect that selective discrimination has on all employees cannot be doubted.

Antiunion Animus

There is direct evidence of the Respondent's antiunion animus. From the unrebutted and credited testimony of Armenteros and Rodriguez, it is clear that the Respondent's hostility toward the Union and employees who supported it emanated from the highest level, to wit, Dr. Mora, a founder and member of the governing board of directors whose spouse is the board chairperson. Mora stated more than once that he would fire Armenteros and his family members if they signed union cards and made other antiunion remarks. Because of Mora's position, his animus must be considered to bear on all of the alleged discriminatees, not only Armenteros.

Direct evidence of animus bearing on the alleged discriminatees as a whole is also found in the independent 8(a)(1) violations, including various threats and numerous instances that the security department ordered employees to stop distributing union literature on their nonworktime in nonpatient care, nonwork areas.

A. Francisco Anido

Anido signed a union card and had conversations about the Union with coworkers. The Respondent discharged him on January 13 because of one particular such conversation in late December 2003. The last element, animus, is satisfied by Dr. Mora's expressed hostility toward employees who supported the Union, as well as the Respondent's commission of independent violations of Section 8(a)(1). I conclude that the General Counsel has made out a prima facie case of unlawful discharge under *Wright Line*.

Going to the Respondent's proffered justification for Anido's discharge, the sole basis was the one conversation in which he purportedly threatened coworker Mirta Rene with physical and personal harm. Basically, the Respondent contends that the threatening nature of Anido's statements removed it from the penumbra of protected union activity.

As I previous stated, I do not credit Rene's account of that conversation or, more importantly, COO Corzo's testimony about the circumstances behind Anido's discharge. I will not repeat all of the reasons I described earlier for finding Corzo unreliable but only highlight the most consequential ones, insofar as evaluating the validity of the Respondent's defense.

Anido's supervisor, Director Delgado, whom I find credible, directly contradicted Corzo's testimony that she asked him to investigate Rene's complaint, and that he later told her he had met with Anido, Anido had admitted in part the allegations, and he had terminated Anido. Delgado's testimony that he conducted no investigation was consistent with Anido's, and his testimony that Corzo presented him with Anido's discharge as a fait accomplish comports with the termination paper and both HR Director Bosch's and Delgado's statements at Anido's termination interview that "the administration" had discharged him.

This not only seriously undermined Corzo's credibility. Her failure to conduct any kind of investigation whatsoever after the one conversation with Rene undermines the Respondent's defense that Anido was discharged for threatening Rene, especially since the normal procedure

when there is a threat against an employee is to conduct an investigation (testimony of CNO Sosa-Guerrero). An employer's failure to conduct a fair and complete investigation of allegations of employee misconduct suggests that the employer is not genuinely interested in knowing the underlying facts and circumstances of the event but, rather, is looking for a pretext. See *Publishers Printing Co.,* 317 NLRB 933, 938 (1995) *Burger King Corp.*, 279 NLRB 227, 239 (1986) *Syncro Corp.*, 234 NLRB 550, 551 (1978).

Further, Corzo failed to obtain any kind of written statement from Rene, prepare any kind of formal report, or make a referral of the matter to the security department before proceeding to have Anido discharged. Significantly, Sosa-Guerrero further testified that when there is a threat to an employee, a security report is generated. Thus, Corzo, a high-level manager, incredibly asserted that she discharged an employee based only on the verbal complaint of another employee with no documentary confirmation of what the employee said.[52]

This conduct was wholly inconsistent with the normal management goal of having adequate documentation in the event that a discharge or other disciplinary action against an employee is challenged. This suggests that, for whatever reason, Corzo did not want Anido's discharge to be documented and leads to further doubt that the defense offered by the Respondent was the real reason for Anido's termination.

In sum, Corzo alone heard Rene's allegations and made the decision to discharge Anido. Her testimony concerning the discharge was not credible, and the actions she took were inconsistent with the conclusion that it was based on the good-faith belief that Anido had engaged in misconduct. It follows that the Respondent has failed to meet its burden of showing by a preponderance of the evidence that it would have discharged Anido on January 13, 2004, other than for his protected union activities. Therefore, the discharge violated Section 8(a) (3) and (1) of the Act.

B. Juan Carlos Cardenas

Cardenas was active in various types of union activity prior to his discharge on January 13: he wore a union lanyard daily to work, from the end of December 2003 on, passed out flyers in the lobby or cafeteria two or three times a week, starting in about late November 2003, and also solicited employees to sign authorization cards in the cafeteria and lobby, starting in November 2003 and continuing until his discharge. On one occasion that he passed out flyers, he encountered and spoke with Dr. Sanjenis, who informed him she was a supervisor. The Respondent's proffered defenses for his termination, along with security logs and testimony of guards, further demonstrate employer knowledge of his union activities.

Animus is found in independent violations of Section 8(a)(1) directed specifically at Cardenas (Bosch's articulation of an overly broad no-solicitation/no-distribution rule at his termination interview and counsel's June 11 letter), and in Dr. Mora's hostility toward employees engaged in union activity.

I conclude that the General Counsel has made out a prima facie case of unlawful termination and now turn to the Respondent's defenses. There were discrepancies between

[52] Even if not excluded, her purported notes of the conversation with Mirta—untitled and undated and consisting of two brief handwritten incomplete sentences—hardly qualify as a meaningful memorialization.

hospital witnesses on the exact reasons that Cardenas was discharged. Director Zuniga testified that at her first meeting with Corzo, in December 2003, she reported to Corzo only that Cardenas had been pressuring employees to sign cards and join the Union. Corzo, on the other hand, testified that Zuniga also told her about union literature being distributed in the department. At the second meeting, in January, Zuniga testified that Corzo stated that she had received numerous other reports that Cardenas had engaged in soliciting for the Union in patient care areas during worktime. Corzo, however, testified that she told Zuniga not only that she had reports of Cardenas soliciting employees but also of his having posted flyers and taken pictures during worktime. I note that at Cardenas' termination interview, Bosch said nothing about his taking pictures.

Neither Zuniga nor Corzo was satisfactorily credible concerning the reasons for Cardenas' discharge. As to Zuniga, none of the employees who allegedly complained to her about Cardenas were called as witnesses, and thus her hearsay testimony was not corroborated; moreover, she was evasive and directly contradictory on the important matter of how many conversations she had with Corzo about Cardenas prior to his termination.

Corzo's versions of her December and January 9 meetings with Zuniga were not fully consistent with Zuniga's and appear to have constituted an attempt to expand the bases for discharge. Corzo's credibility was further diminished by her failure to recall any other specific instances when she has contacted the hospital's attorneys before terminating an employee, following her testimony that she does so most of the time; by her first testifying that several other employees had made reports to her about Cardenas and then being able to name only one; and by her failure to have anything in writing from any of the employees who allegedly made such reports.

Inasmuch as Cardenas' alleged violation of the hospital's no-solicitation/no-distribution rule is the primary focus of the Respondent's defense, I will now address it. Cardenas testified he engaged in all of his union activities on nonworktime, and no evidence was introduced to the contrary.

The record reflects that employees in at least many departments posted personal items, including advertisements, on department bulletin boards. In some departments, catalogues for Avon products and other nonhospital purposes were maintained in open view.

Employees (and at least one nonemployee) were permitted to engage in solicitation for purchases and sales. Such activities were frequent, widespread, and openly conducted; often with the knowledge of supervisors and sometimes with their direct participation. Frequently, this occurred on employees' worktime with awareness by supervisors, who they took no action. Felix Monzon is the best example of the hospital's permissiveness toward solicitation for sales. He sold various products for many years with the full knowledge of his supervisors and was never once told to stop. Prior to Camejos and Cardenas, only one employee was ever disciplined for engaging in solicitation of sales (Marciela Fernandez), and she received just a verbal warning.

In sum, the Respondent's written no-solicitation/no-distribution policy was not strictly enforced on a hospital-wide basis prior to the Union's organizing campaign. Even if Cardenas and Camejos did violate the written policy on no-solicitation/no-distribution, the imposition of the penalty of discharge on them was disparately harsh compared to the verbal warning issued to Fernandez and, more strikingly, at total odds with the leniency the hospital has displayed toward other employees, such as Monzon, who have engaged in other kinds of solicitation on a regular basis. This undercuts the Respondent's reliance on its no-solicitation/no-distribution policy as a

defense. See *Avondale Industries*, 329 NLRB 1064, 1065 (1999); *Merillat Industries,* 307 NLRB 1301, 1303 (1992).

Since Corzo (but not Zuniga) testified that Cardenas' taking of photographs was also a factor in his discharge, I will now address the issue. The hospital has no written prohibition or other policy against employees taking photographs of other employees, even in patient care areas or their proximity, and such activity is not an unusual occurrence or one considered by employees to be a major breach of hospital policy. Even if Cardenas engaged in such on worktime, other employees have been allowed to engage in solicitation or distribution on worktime with impunity. In these circumstances, this defense fails.

By management's failure to provide a consistent, coherent, and sustainable defense, the Respondent has failed to meet its burden of showing that it would have discharged Cardenas on January 13, 2004, other than because he engaged in protected union activities. Therefore, the discharge violated Section 8(a)(3) and (1) of the Act.

C. Reymundo Camejos

Camejos engaged in various activities in support of the Union, including wearing a union lanyard or button daily starting in mid-November 2003. His supervisor, Director Diaz, observed this and believed that Camejos was the one who was posting union materials on the bulletin boards and department secretary's counter. He was discharged on January 14 for engaging in allegedly prohibited solicitation or distribution on behalf of the Union. The last element, animus. has been shown by the Respondent's independent violations of Section 8(a)(1), in particular, Bosch's enunciation of an overly broad no-solicitation/no-distribution policy at Camejos' termination interview, and by Dr. Mora's antiunion attitude. I conclude that the General Counsel has made out a prima facie case of unlawful termination under *Wright Line*.

Since Camejos' termination paper was never located, the Respondent's reasons for his discharge must be taken from the testimony of its witnesses. There is no dispute that at his termination interview, Bosch told Camejos that his discharge had to do with his soliciting/ distributing on behalf of the Union, although Bosch, Diaz, and Camejos recalled her exact words differently. Because of this and because management representatives provided differing justifications, the reasons for Camejos' discharge are not entirely clear.

As with Anido's discharge, Corzo made the decision to terminate Camejos. Once again, her version of how and why management came to the decision to discharge was not supported by the employee's direct supervisor, here Diaz. For reasons stated, I credit Diaz and find that Corzo told him she had heard Camejos was making "malicious" statements about the hospital (to the effect of employees suing it), he stated that he believed that Camejos was posting and placing union paraphernalia in his department, and she then instructed him to terminate Camejos. He did not tell her, as testified by Corzo, that he had previously warned Camejos about distributing literature during worktime and in patient care areas but that Camejos had continued to do so.

Similarly, Diaz did not corroborate Bosch's testimony that at the termination interview, she stated that Camejos had been put on notice several times but had continued to violate the no-solicitation policy to the point where he was "insubordinate" to his supervisor (Diaz).

I find that this testimony of Corzo and Bosch, that Camejos' alleged failure to heed prior warnings, or insubordination, was another ground for his discharge, constituted an after-the-fact attempt to buttress the Respondent's case. To the contrary, rather than strengthen it, such

advancement of a new reason is an indication that the Respondent's asserted reasons for Camejos' termination were pretextual and not bona fide. See *McClendon Electric Services*, 340 NLRB No. 73, slip op. at 2 (2003); *Meaden Screw Products Co.,* 336 NLRB 298, 302 (2001).

So did the failure of Corzo to conduct any kind of investigation into the matter, after Diaz merely stated he "believed" that Camejos was posting or otherwise distributing union paraphernalia in the department. See *Publishers Printing Co.,* supra; *Burger King Corp.*, supra; *Syncro Corp.*, supra.

I dealt with the hospital's lax enforcement of its rules against employee solicitation and distribution in the section on Cardenas' discharge and reach the same conclusions as to Camejos.

On the matter of the treatment of other employees, I further note that in the 16 years that Diaz has run his department Camejos has been the only employee he has discharged. Common sense dictates the conclusion that other employees in Ortiz' department during those many years violated hospital policies but that none of their misconduct was considered serious enough to warrant termination. The Respondent has no doubt treated other employees who violated hospital policies differently, undermining its defense that Camejos was discharged for violating the hospital's no-solicitation/no-distribution rules. See *Avondale Industries*, supra; *Merillat Industries,* supra.

As with Cardenas, management's failure to provide a consistent, coherent, and sustainable defense for Camejos' discharge on January 14, 2004, equates to a failure by the Respondent to meet its burden of showing that it would have discharged him other than because he engaged in protected union activities. Therefore, the discharge violated Section 8(a) (3) and (1) of the Act.

D. Pedro Armenteros

Armenteros signed an authorization card on November 20, 2003. Office Manager Cabrera and Director Rodriguez, agents of the Respondent, told him on about December 30 and on about January 13 or 14, respectively, that Dr. Mora had found out he filled out a card and that he was fired or going to be fired. Armenteros was discharged on February 23, following which he was threatened by letter of June 11 with legal action if he "trespassed" on hospital property. I conclude that the preceding establishes all of the elements necessary for a prima facie case of unlawful discharge under *Wright Line*.

Executive Director Sanchez was the one who made the decision to terminate Armenteros, for allegedly "basically collecting a salary and not doing any work."

Sanchez' his testimony about what led to his decision was not convincing. Thus, I do not credit his uncorroborated testimony that Bosch sua sponte named Armenteros as "another 'phantom employee'" in a conversation he had with her in January or February; his uncorroborated testimony that secretaries on the administrative staff told him that Armenteros was a courier for their office and no one else; or his professed ignorance of Armenteros' role as a personal chauffeur for the Mora family.

Strikingly similar to Corzo's treatment of Anido, Sanchez came to the conclusion that Armenteros was "not doing any work" without ever communicating, either directly or indirectly, with Armenteros or, according to Sanchez' own testimony, with Drs. Mora or Sanjenis, for whom Armenteros performed most of his work. This failure to conduct a fair and complete

investigation weakens the Respondent's defense. See *Publishers Printing Co.,* supra; *Burger King Corp.*, supra; *Syncro Corp.*, supra.

In light of Armenteros' long tenure (over 19 years) as an employee, the timing of his discharge—only a couple of months after he signed an authorization card—also is suspicious. See *Howard's Sheet Metal*, 333 NLRB 361 (2001); *Signature Flight Support*, 333 NLRB 1250 (2001); *Masland Industries*, 311 NLRB 184 (1993). This is particularly so because I have discredited Sanchez' testimony that Bosch triggered his investigation of Armenteros in January or February. The record is left without credible evidence of why and when the Respondent suddenly decided to scrutinize Armenteros' duties as an employee after so many years—or of credible evidence of why he was discharged.

I conclude in these circumstances that the Respondent has failed to meet its burden of showing that it would have discharged Armenteros on February 23, 2004, other than for his protected union activity. Therefore, the discharge violated Section 8(a)(3) and (1) of the Act.

E. Hector Gonzalez

Gonzalez started wearing union lanyards and stickers daily at work in December 2003, and that same month started distributing union pamphlets three or four times monthly. His picture was on a union flyer, which was widely distributed in the hospital, and on the day of the election, January 26, he was among a group of 30 or so union supporters celebrating the Union's victory whose photographs were taken and circulated by the media.

Based on the extensiveness of Gonzalez' overt union activities at the hospital, employer knowledge of his union activity can be inferred. See *E. Mishan & Sons,* 242 NLRB 1344 (1979); *Texas Industries*, 156 NLRB 423 (1965). Animus is shown by the Respondent's commission of various violations of Section 8(a) (1), as well as Dr. Mora's antiunion attitude. Gonzalez was discharged on May 14. I conclude that the General Counsel has established a prima facie case of unlawful discharge under *Wright Line*.

Manager Rodriguez made the recommendation to Corzo that Gonzalez be discharged. He averred that shortly after he came to the hospital in May 2004, he reviewed pending workers' compensation files and determined that Gonzalez should be terminated because, in essence, Gonzalez could not perform his job duties as a cafeteria aide or otherwise be accommodated for his permanent physical restriction. Rodriguez also testified that Gonzalez' part-time job at Publix market weighed heavily in his recommendation that Gonzalez be terminated, because his job there as a "stock clerk" could result in injury that could subject the hospital to further worker's compensation exposure.

Rodriguez was not satisfactorily credible. First as to the part-time job, Gonzalez testified that he was a bag boy, not a stock clerk. Rodriguez never inquired of either him or Publix exactly what his job duties were. Moreover, Gonzalez worked for Publix for approximately 13 years prior to his termination from the hospital, and Bosch conceded that the hospital was aware for years that he held this second job. Second, Rodriquez twice testified contrary to his June 2004 NLRB affidavit, given only about 3 months earlier, and on simple facts.

As with Executive Director Sanchez and Armenteros, Rodriguez failed to conduct a meaningful investigation into the nature of Gonzalez' part-time position. This undercuts the conclusion that concerns relating to that employment were a bona fide reason for his discharge, especially when he had worked there for so many years without any evidence it adversely

impacted his job at the hospital. See *Publishers Printing Co.,* supra; *Burger King Corp.*, supra; *Syncro Corp.*, supra.

The Respondent's defense is further undermined by the timing of the discharge and by its very different treatment of another individual, Mercedes Garcia, who was in a similar situation in terms of having a longstanding workers compensation claim and permanent medical restrictions involving lifting.

Respecting timing, as early as her work status report of November 18, 2001, Dr. Redondo stated Gonzalez' restriction of no lifting over shoulder level was permanent, and she repeated in subsequent reports that the restriction was permanent.

It is true that earlier internal reports of the hospital reflected a desire to terminate Gonzalez and fear that such could subject the hospital to liability under the ADA. The fact remains that nothing was said to Gonzalez about dissatisfaction with his job as cafeteria aide or that his employment was in any way in jeopardy until the date he was terminated, May 14, following his engaging in union activity and 2-1/2 years after Dr. Redondo placed him on permanent lifting restriction.

Rodriguez' claim that he saw "red flags" in Gonzalez' file and decided he should be discharged, without first even talking to him, contacting Publix, or getting an updated medical opinion, seems all too convenient. The haste with which the Respondent discharged Gonzalez—at most, 2 weeks between the time Rodriguez stated he reviewed Gonzalez' file and the date of termination—further strikes me as inconsistent with a genuine desire to fully ascertain the surrounding facts.

As to Mercedes Garcia, both Rodriguez and Director Ortiz went out of their way to accommodate her. Thus, she was offered a temporary position as team leader to accommodate her permanent medical restriction, and Rodriguez and Ortiz determined that if her job duties required any overhead lifting, she would be helped by either sanitation aides or cafeteria aides. She also was relieved from having to push a heavy door upstairs because she said she could do everything except that. Clearly, the Respondent treated a similarly situated employee very differently, a fact sapping the defense that Gonzalez was discharged because his permanent limitation could not be accommodated. See *Avondale Industries*, supra; *Merillat Industries*, supra.

Finally, the failure of the Respondent to produce a document referenced in Gonzalez' termination report and used as a reason for his discharge, to wit, the alleged May 15, 2003 report from Dr. Redondo stating that he had reached MMI, further weakens its defense that Gonzalez was terminated because of his physical limitations.

In light of all of the above, I conclude that the Respondent has not met its burden of showing that it would have discharged Gonzalez on May 14, 2004, other than for his protected union activities. The discharge therefore violated Section 8(a)(3) and (1) of the Act.

F. Felipe Hernandez

Hernandez' union activity and employer knowledge thereof were established by Director Ortiz, who testified that he knew Hernandez was a union supporter because Hernandez wore lanyards and SEIU buttons at work. Animus toward Hernandez can be inferred from the independent violations of Section 8(a) (1) committed by the Respondent, as well as from Dr. Mora's attitude. The Respondent admittedly failed to contact Hernandez after he applied for re-

employment in May. I conclude that that a prima facie case of unlawful termination under *Wright Line* has been made out and will now examine the Respondent's defenses.

Preliminarily, I note the similar credited testimony of Directors Ortiz and Delgado that if they have a vacancy in their respective department, they have authority to hire directly. Ortiz also testified that he was aware that Hernandez applied for a position and that he wanted him rehired as a sanitation aide (Ortiz testified that most employees in kitchen services, regardless of title, perform both cafeteria aide and sanitation aide duties).

The Respondent, through Bosch, has raised two main defenses for why Hernandez was never contacted after he applied: first, his application was defective; second, there were no vacancies at the time it was received.

Bosch emphasized the fact that, in his application, Hernandez wrote "(o)pen kitchen" in the portion for position applied for. She stated unequivocally that job applications listing no specific position are rejected and essentially filed away for good. Contradicting her testimony, other applicants who failed to specify specific positions in their applications were offered employment during the same period that Hernandez applied. Dilia Sanchez was offered a kitchen aide position yet wrote only "kitchen" on her application. Ana Hernandez started as a cafeteria aide on May 21, when she had only written "any" in the position portion of the application and not even specified a department. Moreover, neither of these individuals offered positions in the kitchen had previously been employed by the hospital. I also, note Ortiz' testimony that when he hires directly, the applicant need not specify a job title.

The Respondent's acceptance of new employees' applications that did not specify a particular position, while rejecting one from a former employee for that reason, strips the viability of this defense for not hiring Hernandez. Cf. *Avondale Industries*, supra; *Merrilat Industries*, supra. This conclusion is bolstered by the fact that Ortiz wanted Hernandez back in his department.

The Respondent further contends that by the time Hernandez' application was received, there were no positions available, because those listed in the April 22 and May 1 HR job announcements had already been filled.

Hernandez' application shows an HR log-in date of May 13. Bosch testified that it was not until about May 11 that the decision was made to offer the position of cafeteria aide to Dilia Sanchez, whom HR was unsuccessful in contacting. The Respondent provided no evidence of how long its efforts to reach her lasted or when it gave up. Nor did the Respondent produce evidence that as of May 13, it had pending offers to applicants for either of the other two posted food services positions. Ana Hernandez did not start working as a cafeteria aide until May 21, 8 days after Hernandez applied.

I conclude that as of May 13, when Hernandez' application was received, there were still one or more unfilled positions in food services, undercutting the Respondent's defense that no positions were available.

In the absence of demonstrating valid reasons why Hernandez was not rehired, the Respondent has failed to show that it would have taken the same course of action other than for Hernandez' protected union activities. Accordingly, I conclude that the Respondent violated

Section 8(a) (3) and (1) of the Act by not rehiring Hernandez starting on May 13, 2004.[53]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Created the impression of management surveillance of employees.

(b) Instructed employees to remove union insignia.

(c) Interrogated employees about their union activities.

(d) Prohibited employees from distributing union literature during nonworktime in nonwork, nonpatient care areas.

(e) Threatened employees with the following for their support of the Union or for engaging in concerted protected activities:

i. Civil or criminal action.
ii. Discharge.
iii. Replacement with outside contractors.
iv. Rescission of an "open door" policy.
v. Unspecified reprisals.

(f) Told employees:

i. Not to discuss employment matters concerning their mutual aid and protection with coworkers.
ii. Selecting the Union as their collective-bargaining representative would be futile.
iii. The hospital could enforce an overly broad no-solicitation/no-distribution rule and discharge an employee for violating it.

4. By discharging employees Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, and Hector Gonzalez and failing and refusing to rehire Felipe Hernandez, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a) (3) and (1) of the Act.

5. By issuing written warnings to Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia because they engaged in concerted protected activities for their mutual aid and

[53] Contrary to what the Respondent asserts in its brief at 53, Ortiz did not testify (at Tr. 2350-2354) that Hernandez was later offered the cafeteria aide position for which Sanchez could not be reached, and he did not respond.

protection, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a) (3) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily failed and refused to rehire Felipe Hernandez, it must offer him employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from May 13, 2004, to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., supra, plus interest as computed in *New Horizons for the Retarded*, supra.

The General Counsel also seeks expungement from the Respondent's records of any references to the discharges of Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, and Hector Gonzalez; and any references to the January 20, 2004 written warnings issued to employees Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia.

Finally, the General Counsel seeks rescission of the June 11, 2004 letters sent to Armenteros and Cardenas

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[54]

ORDER

The Respondent, Pan American Hospital Corporation, Debtor in Possession, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of management surveillance of employees' union activities.

(b) Instructing employees to remove union insignia.

(c) Interrogating employees about their union activities.

[54] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Prohibiting employees from distributing union literature during nonworktime in nonwork, nonpatient care areas.

(e) Threatening employees with civil or criminal action, discharge, replacement with outside contractors; rescission of an "open door" policy; or unspecified reprisals because they engage in union or other protected activities.

(f) Telling employees not to discuss employment matters concerning their mutual aid and protection with coworkers, that selecting the Union as their collective-bargaining representative would be futile, or that the hospital can enforce an overly broad no-solicitation/ no-distribution rule and discharge an employee for violating it.

(g) Issuing written warnings to employees because of their protected concerted activity.

(h) Discharging employees because of their union activities.

(i) Failing and refusing to rehire employees because of their union activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, and Hector Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, offer Felipe Hernandez a position in the food and nutrition services department or, if no job exists in that department, to a substantially equivalent position.

(c) Make Anido, Armenteros, Camejos, Cardenas, Gonzalez, and Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the discharges of Anido, Armenteros, Camejos, Cardenas, and Gonzalez, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used in any way against them.

(e) Within 14 days of the Board's Order, remove from its files any references to the January 20, 2004 written warnings issued to Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia, and within 3 days thereafter, notify them in writing that this has been done and that the written warning will not be used in any way against them.

(f) Within 14 days of the Board's Order, rescind the June 11, 2004 letters issued to Armenteros and Cardenas, threatening them with legal action for entering the hospital's premises, and within 3 days thereafter, notify them in writing that this has been done and that the letters will not be used in any way against them.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix,"[55] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2003.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 15, 2005

_____
Ira Sandron
Administrative Law Judge

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT create the impression of management surveillance of your union or other protected activities.

WE WILL NOT instruct you to remove Service Employees International Union AFL−CIO, CLC insignia.

WE WILL NOT interrogate you about your union or other protected activities.

WE WILL NOT prohibit you from distributing union literature during nonworktime in nonwork, nonpatient care areas.

WE WILL NOT threaten you with civil or criminal action, discharge, replacement with outside contractors; rescission of an “open door” policy; or unspecified reprisals, because of your union or other protected activities.

WE WILL NOT tell you not to discuss employment matters concerning your mutual aid or protection with coworkers, that selecting the Service Employees International Union AFL−CIO, CLC (the Union) as your collective-bargaining representative would be futile, or that we can enforce a rule unlawfully restricting your solicitation and distribution on behalf of the Union and discharge an employee for violating it.

WE WILL NOT issue written warnings to you because of your union or other protected activities.

WE WILL NOT discharge you because of your union or other protected activities.

WE WILL NOT fail and refuse to rehire you because of your union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board’s Order, offer Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, and Hector Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board’s Order, offer Felipe Hernandez a position in the food and nutrition services department or, if no job exists in that department, to a substantially equivalent position.

WE WILL make Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, Hector Gonzalez, and Felipe Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the discharges of Francisco Anido, Pedro Armenteros, Reymundo Camejos, Juan Carlos Cardenas, and Hector Gonzalez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used in any way against them.

WE WILL within 14 days of the Board's Order, remove from our files any references to the January 20, 2004 written warnings issued to employees Carlos Carbonell, Patria Diaz, Candido Jacomino, Marilu Montano, Rockefeller Moreno, Nelson Rabelo, Xiomara Rodriguez, and Regla Teresa Roja-Garcia, and within 3 days thereafter, WE WILL notify them in writing that this has been done and that the written warning will not be used in any way against them.

WE WILL within 14 days of the Board's Order, rescind the June 11, 2004 letters issued to Pedro Armenteros and Juan Carlos Cardenas, threatening them with legal action for entering the hospital's premises, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the letters will not be used in any way against them.

PAN AMERICAN HOSPITAL CORPORATION
DEBTOR IN POSSESSION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530

Tampa, Florida 33602-5824

Hours: 8 a.m. to 4:30 p.m.

813-228-2641.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 813-228-2662.